EMPLOYMENT TRIBUNALS

Claimant: **Mr J Acholonu**

Respondent: **Transport for London**

Heard at: London South **On:** 23 February 2021

Before: **EMPLOYMENT JUDGE BECKETT** (sitting alone)

Appearances
For the Claimant: Mr Godwin (non practicing solicitor)
For the Respondent: Miss Thomas (counsel)

JUDGMENT

1. The Claimant's claim in respect of unfair dismissal is not well founded and is dismissed.

REASONS

Issues to be determined

2. The Claimant claimed unfair dismissal.

3. The issues to be decided were agreed with the parties and set out in a document provided by counsel for the Respondent to parties prior to the hearing, and were as follows:

    1. Was the Claimant dismissed for a potentially fair reason?
    2. Did the Respondent have a genuine belief in the misconduct of the Claimant?

3. If the Respondent had a genuine belief in the misconduct of the Claimant was it based on reasonable grounds?
4. Did the Respondent conduct as much investigation as was reasonable in the circumstances?
5. Was the decision to dismiss within the range of reasonable responses?
6. If there was procedural unfairness what are the chances the Claimant would have been fairly dismissed in any event (Polkey)?
7. If the Claimant was unfairly dismissed did he contribute to his dismissal?

The Hearing

4. The Claimant gave evidence. The Respondent called evidence from Mr Jonathan Pipe, dismissing officer, and Mrs Vicky Taylor, appeals officer.

5. I considered the documents from an agreed Bundle of Documents of 338 pages which the parties had introduced into evidence. I was also provided with a set of submissions and chronology prepared by counsel for the Respondent.

6. A reporting restriction applies in this case, made upon my initiative under Rule 50 of the Employment Tribunals Rules and Procedures, and following submissions by parties. I have anonymised a person involved in the facts of this case, who is referred to as Z in this judgment. To avoid identifying Z, I have also referred to others involved, aside from the Claimant and witnesses who gave evidence, by their initials alone.

Findings of facts

7. Based on the evidence heard and the submissions made, I found the following facts.

8. The Claimant worked for the Respondent from 27th April 2009, in a role as set out in the papers.

9. In his contract (pages 29 to 38 of the bundle) the Claimant was referred, at paragraph 16, to other company policies and procedures. Sensitive personal data is also referred to, at paragraph 18.2 under the heading data protection. This sets out that the Respondent held some sensitive personal data, which might relate to health, racial or ethnic origin or other matters. It emphasises that such data is processed only in connection with seeking to ensure and monitor equality of opportunity. A further contract is in the bundle at pages 43 to 52, with no difference in respect of these matters.

10. On behalf of the Claimant it was suggested that there might be a policy or other way in which the Respondent would inform others that a colleague was transgender. In fact, that information would fall under this umbrella and as sensitive personal data.

11. The contract also referred to discrimination, at paragraph 24, and stated that further guidance is provided in the Equal Opportunities and Employment policy.

12. The Equality and Inclusion Policy states that "TfL aims to ensure equal and fair treatment without unlawful discrimination in relation to …. transgendered status". It adds that "TfL is committed to working in partnership with external and internal parties to drive forward a strategy to … eliminate unfair discrimination within the business" (paragraph 3, page 195 bundle).

13. The policy cites specific responsibilities for employees, which include displaying a behaviour that contributes to an environment where everyone is treated fairly, equally and with dignity and respect, and to ensure that their behaviour at work does not discriminate against others (page 196).

14. The incident that led to the Claimant's dismissal occurred on 4 May 2018.

15. The Claimant had attended a public venue as set out in the papers alongside a colleague, Z, about 2 to 3 weeks before 4 May 2018. That was the only occasion upon which the Claimant had met Z and there appears to have been interaction of some 7 to 10 minutes at that time.

16. On 4 May 2018 the Claimant attended another public venue, as set out in the papers. On that date there was a conversation between the Claimant and three others: GB, GW and KA.

17. During the conversation there was a discussion as to who the colleague who had previously been at with the group was, and the gender of that colleague.

18. I am satisfied on the evidence that, at that time, the conversation did not involve KA. When asked in the fact finding interview, he did not mention any discussion as to another colleague and their gender. The conversation was one which was accepted by the Claimant as having taken place.

19. On 8 May 2018 GW, who is not employed by the Respondent, and is in fact a self-employed barrister, sent the Respondent the notes of the hearing. In a covering email, GW stated: "I was very concerned by some of [JA's] comments to me and to [GW] outside [the public venue]. He was really rude about Z and referred to her as a "bloke" and "fellow" pretty derisively. That is obviously disrespectful and unacceptable behaviour".

20. Upon receiving that email, the Respondent started an investigation.

21. The Respondent interviewed their employee GB, and obtained further details regarding the allegations from GW. A written record of each account is within the bundle, and I have considered both.

22. GB also stated that the Claimant had said the words “fella” and “bloke” when referring to Z, their female colleague. They had mentioned a few male colleagues before Z was named. The Claimant was told that Z was female.

23. GB also said that the Claimant had used the incorrect pronoun and had been “dismissive and not very interested” when corrected. GB said that she was shocked by the comments.

24. In an email dated 15 May 2018 GW was asked for further details relating to the allegation. The Claimant argued that the questions were leading and the answers should be in effect disregarded. I disagree. The questions either used the words set out by GW and asked for clarification, or were non-leading open questions such as “how did you feel”, and “who were the other people present”.

25. GW responded the following day, confirming the Claimant had said “that bloke” referring to Z. He then said “that other fellow” after names were given to him, but when Z’s name was mentioned, the Claimant was told that Z was a woman. The Claimant responded that “it didn’t matter”, or “what’s the difference”.

26. The Claimant denied making any comments in his fact finding interview on 31 May 2018 (page 131 bundle). He said that when asking about who the person was on the previous occasion, that he had used the pronoun they, not he.

27. He repeatedly asked whether Z was aware of the allegation. I find that there was no need to inform Z of the allegation, either at the outset or as the investigation continued. To do so might cause distress and would not assist evidentially as Z was not present at the time.

28. I find as a fact that it was reasonable for the Respondent to find that the Claimant did refer to Z as a bloke and a fellow, and did use the incorrect pronoun when referring to Z. The very fact that GB had to correct the Claimant and tell him that Z was female tends to show that the Claimant had used the male pronoun to describe Z.

29. GW stated that the Claimant said that he had been told he did not need to bring a certain item with him on the day “by that bloke”. It was the use of the word bloke that prompted GW and GB to name males who might have said this. This supports the contention that the Claimant said bloke, referring to a male colleague.

30. I also find that the Claimant was dismissive and disrespectful in his manner. It was that attitude and the comments made that caused GW to report the incident. She stated in her email that “for Jude to say that Z was a “bloke”

and a "fellow" he would have had to recognise that she is a trans person who unambiguously identifies as a woman and then decided to reject that. It must have involved a conscious decision to reject her clear identity". I find as a fact that GW's analysis of the situation was as she perceived the situation to be having witnessed the incident herself.

31. It was repeated numerous times in evidence and on behalf of the Claimant in the Tribunal that it was an informal chat, a conversation between colleagues and just general chit chat.

32. It was also submitted on behalf of the Claimant that the Respondent would not wish to prevent its employees from chatting "freely" in an informal way in public. In its policies, the Respondent has set out in clear terms what is expected of its employees both at their workplace and in public. It is clear that remarks of the nature alleged in this case would not be endorsed by the Respondent in any setting.

33. I do not accept that making offensive remarks within an informal chat is in any way less serious than doing so in a more professional setting. The Claimant obviously felt safe or confident enough to make such a remark within that group setting, irrespective of whether other members of the public could hear him. It does not matter that there is no evidence from Z as to the impact on her. The impact made on those who heard the comments was of shock. The comments made do not have had to cause Z harassment as submitted on behalf of the Claimant.

34. KA was also spoken to and did not mention this issue at all (page 137 bundle). This is consistent with the accounts of GW, who stated that it was only three of them at that time, and was not inconsistent with GB's account, as she could not recollect if KA was present at that point.

35. The Claimant argued that the evidence of KA was disregarded, and that was unfair as KA's evidence supported his account.

36. I do not find that it was improper or unfair to disregard the evidence of KA, either at the initial disciplinary hearing or the appeal. It was clear that he was not present when the remarks were made. I therefore reject the submission made on behalf of the Claimant that the Respondent was "cherry picking" and not examining the evidence in its totality. It was as a result of examining the evidence in its entirety that KA was found not to be a material witness.

37. There was due to be a follow up interview, however the Claimant was signed off on sick leave at that time. The Claimant was then suspended in respect of other allegations (namely failure to follow reasonable instructions from his manager in respect of health and safety) on 6 June. The Claimant was then signed off again from 11 June to 4 October 2018.

38. Whilst on sick leave the Claimant was informed by letter that the investigation was being widened in scope to include those new allegations. That letter was sent on 8 August.

39. The Claimant was asked to attend an interview to deal with those allegations, however he did not attend and did not provide any written submissions. The conclusion of the investigation was that all three allegations should be referred to a disciplinary hearing.

40. The formal disciplinary hearing took place on 29 November 2018. At that hearing the Claimant denied using the words “fellow” or “bloke”, but said that he had used the pronoun “it”. I find that this was inconsistent with his account at the fact finding stage, and in fact could be offensive in itself.

41. The Claimant said that when the name Z was given he responded “that’s it”. He said that GB then said, “it’s not a he, it’s a she”. There would have been no need for any correction if the Claimant had not said he, as I found earlier.

42. The Claimant asked in the hearing if it was “homophobic to say “what’s its name again”, adding that he “didn’t want to offend anyone so [he] referred to “its” name”. He then confirmed he would not use the pronoun it for his female union representative. I find as a fact that the Claimant was clearly aware of that gender might be an issue when referring to Z, although I do not need to (and am unable to) decide how that came about.

43. The Claimant initially said that his colleague KA was present but later said that it was just him, GB and GW “in our little corner” (page 232 bundle). This is a further inconsistency in his account.

44. Following that hearing the Respondent found the second and third allegations not proven. However, the Respondent found that the allegation relating to remarks made on 4 May 2018 was proven and amounted to gross misconduct. The Claimant was therefore dismissed without notice on 1 March 2019.

45. Jonathan Pipe was the dismissing officer. Complaint is made that he also dealt with allegations made by the Claimant in 2015/ 2016 and that, in light of the size of the Respondent company, he should not have heard the disciplinary hearing. The pack relating to the 2015/2016 allegations of bullying by a compliance manager is in the bundle (pages 55 to 62). I note that it is clear from the investigation report made by Mr Pipe that he had conducted a thorough and fair investigation.

46. I do not find that Mr Pipe should have recused himself from this role in 2018/2019 as a result of the previous allegations. Sufficient time had passed between the investigations and there was no evidence placed before me that showed that Mr Pipe had not conducted a fair disciplinary hearing. In addition, he did not find all allegations proven, which shows a considered and fair approach.

47. Further complaint was made that MF, with whom the Claimant had a poor working relationship, was used as a note taker in an interview with GB. Again, I do not find that this makes the procedure unfair. His role was to take

notes. He asked one question at the end of the interview, which amounted to clarifying an answer already given. It is clear from the annotated copy that it was found to be inappropriate and was disregarded. In any event, I have disregarded the final answer.

48. Thereafter the Claimant appealed this decision and the appeal hearing took place on 26 March 2019.

49. At the appeal hearing the Claimant stated that he had said "what's his name" when referring to Z (pages 301 to of the bundle).

50. The outcome of the appeal was that it was unsuccessful, and the Claimant was advised of this in a letter dated 10 April 2019 (pages 306 to 309 bundle). By that time the Claimant had contacted ACAS and the relevant certificate was then provided on 2 May 2019.

51. The reasons for the appeal being refused were outlined in the letter written by Vicky Taylor. I find that she had investigated all the points that the Claimant had raised in his appeal, including that he felt that he was being singled out, and that he had made a genuine mistake for which the penalty was too harsh.

52. The claim made to the Employment Tribunal was received on 5 June 2019.

53. The Claimant subsequently made a witness statement. The incident is detailed in paragraph 8 of that statement. The Claimant stated that GB had made a comment about him being early, and the Claimant responded that he was always early and that GB could "ask what's its name". Various names were given until the name Z| was mentioned, and the Claimant said, "that's it". GB said that Z was a woman, and the Claimant responded, "fair enough".

54. At the hearing on 22 and 23 February 2021, the Claimant repeated that he had not made the remarks attributed to him. He had highlighted that he had been sent to Soho during Pride and had previously had no complaints "reported by lesbians, gays or transgenders". It was submitted on his behalf that he in light of this, and with the background of his employment of 10 years with the Respondent, it could not be right for his to be dismissed for gross misconduct.

55. In evidence the Claimant said that he had asked "what's his name again" when trying to think of Z's name.

56. Other grievances were referred to, and the Claimant was asked about a letter dated 29 March 2018 which had been sent to him only weeks before the incident (page 174 bundle). In that letter, it was confirmed that there would be no formal proceedings against the Claimant. However, it was noted that his conduct witnessed by the investigator had been unacceptable, and the recommendation made was that the Claimant enrol himself on a personal impact course dealing with communication style. It was reported that the

Claimant's conduct fell "well below the standard expected of a Transport for London employee".

57. The Claimant accepted in evidence that he had not enrolled himself on the course, and had in fact taken out a grievance as that person had not given such advice in the meeting.

58. In respect of the 4 May incident, at the hearing the Claimant stated that he did not accept any wrongdoing on his part, as what was described by the witnesses had not happened, and that he did not know at the time that Z was transgender. In light of the fact findings made above, I dismiss this account.

59. I find that the use of the words "bloke" and "fellow", along with the pronoun "he", were deliberately used by the Claimant.

Law relating to unfair dismissal

60. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 1 March 2019.

61. Section 98 of the 1996 Act deals with the fairness of dismissals.

62. Section 98(4) provides:

> "… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case".

63. In respect of misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in British Home Stores v Burchill 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt.

64. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds, and after carrying out a reasonable investigation. On this aspect, the burden of proof is on the Respondent.

65. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band of

reasonable responses open to an employer in the circumstances. These aspects have a neutral burden of proof.

66. A Tribunal must not substitute its own view for that of the employer. It is not for me to decide what the Respondent ought to have done. The test is not whether a reasonable employer would have dismissed rather than imposing a lesser penalty such as a warning. The test is whether the dismissal was within the range of reasonable responses of a reasonable employer in all the circumstances.

Conclusions

67. I shall deal with the facts of this case in accordance with the test in BHS v Burchell. First, did the Respondent genuinely believe that the Claimant committed the misconduct. I find that they did. They had evidence which was consistent in terms of the words used, and the attitude of the Claimant at the time.

68. The Respondent was entitled to place weight on the account given by the independent witness, GW, whose account was supported by GW. GW had felt the issue of sufficient importance to raise as an issue. The account given by the Claimant was inconsistent, and the other party alleged to have been present on the day was found not to have been present at the time of the conversation. Accounts were obtained from each person and were fully considered by the investigating officer, Mr Pipe.

69. The evidence in front of the investigating officer, as set out above, was sufficient for them to form a reasonable belief in the misconduct.

70. The Respondent has discharged its burden of proof in respect of this issue.

71. Second, was that belief held on reasonable grounds? The burden of proof in respect of this overall question of fairness is neutral. I must consider the reasonableness of the Respondent's conduct, not the injustice to the Claimant.

72. I find that the belief was held on reasonable grounds. The Respondent had two credible and consistent accounts, one made by a barrister instructed by the company. As an aside I note that, given that barristers' practices are founded on forming good working relationships with instructing solicitors and lay clients, it would be against RW's interests to report misconduct by the Respondent's employee. RW reported it as she was shocked and concerned about what she believed were transphobic comments.

73. The Claimant's accounts at to what was said did not accord with those of the other witnesses, and was inconsistent between the fact finding interview, the disciplinary hearing and the appeal hearing. In those circumstances the Respondent was entitled to find that the disputed comments had been made.

74. Third, was there a fair and reasonable investigation? I find that there was. The investigating officer spoke to all of those present during the hearing. Criticism has been made on behalf of the Claimant that Z was never spoken to. I do not accept that as a valid criticism of the Respondent. Indeed, it would have been inappropriate to inform Z about the comments made.

75. As regards procedure generally, I find that the procedure followed was reasonable. The various stages of the process that were undertaken were fair, and although the timescales could have been shorter, in the circumstances of this case, where there were initially multiple allegations, the Claimant was suspended and then signed off for a period of time, the delay was not such that would render the process unfair. The Claimant was updated as to the next stages and kept informed as to timescales. He was also represented by a Trade Union representative at each stage.

76. The Claimant raised an issue regarding Mr Pipe's role as investigating officer. Mr Pipe found two of the allegations not proved and there was no evidence that he had any bias against the Claimant. Had there been any such bias, this would have been remedied in this case by the appeal.

77. Finally, the question is whether the dismissal was a fair sanction. Could a reasonable employer have decided to dismiss the Claimant for making comments and using incorrect pronouns such that others present, in essence, found them to amount to transphobic behaviour.

78. The comments made were in a public place, and reported to the Respondent by a third party who was shocked by the Claimant's behaviour.

79. The relevant policies for employees of the Respondent company set out in clear terms that the expectation is that each employee must display a behaviour that contributes to an environment where everyone is treated fairly, equally and with dignity and respect. Each employee must also ensure that their behaviour at work does not discriminate against others. Transgender status is specifically referred to in respect of discrimination.

80. It was made clear during the evidence and submissions, that the Respondent had considered the lack of any remorse, understanding, acceptance or acknowledgment of the consequences of such remarks as contributing to their decision to dismiss. Although the Claimant stated that he had apologised, this was not noted within the notes of the fact finding meeting or the disciplinary hearing.

81. It was noted at the appeal hearing that he had previously offered an unreserved apology. However, this was not verified.

82. I reject the submission made on behalf of the Claimant that the matter could be dealt with by way of advice (namely that it was "not appropriate to call Z a fellow", and not to do that). The Respondent has noted that the Claimant

had been warned regarding previous conduct and had been asked to undertake training regarding communication skills. He had refused to do so.

83. Given the Claimant's resistance to attend relevant training, it could be said that the Respondent had concerns that there could be a repeat of this behaviour, in a role in which the Claimant was representing his employer in a public setting. It was reasonable for the Respondent to dismiss advice, and other lesser sanctions, as an option.

84. I find that it was within a range of reasonable responses to dismiss the Claimant.

85. I find, therefore, that the Claimant was not unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

86. The claim is dismissed.

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Employment Judge Beckett

Dated: 23 February 2021