EMPLOYMENT TRIBUNALS

Claimant: Mr A Boksh

Respondent: Abellio London Ltd

Heard at: London South Employment Tribunal by CVP
On: 30 June 2021

Before: Employment Judge Keogh

Representation
Claimant: Mr G Baker, Counsel
Respondent: Mr W Griffiths, Counsel

JUDGMENT

1. The Claimant's claim for unfair dismissal succeeds.

2. The matter will proceed to a remedy hearing on 19 August 2021 at 10am for 1 day, by CVP.

REASONS

1. This is a claim for unfair dismissal brought by Mr A Boksh against his former employer Abellio London Ltd. The claimant was represented by Mr Baker of Counsel and the Respondent by Mr Griffiths of Counsel. I heard oral evidence from Mr Martin Moran and Ms Stephanie Achief for the respondent and from the claimant. I also had a statement from Mr Richard Taggert, for whom a hearsay notice was provided. It was conceded that I should give such weight to that evidence as I saw fit having regard to any submissions the parties may wish to make at the conclusion of the hearing.

2. At the outset of the hearing there was an application to amend the claim to add a claim for wrongful dismissal. The claim form does state that the claimant was not paid notice at paragraph 6.3, however there was no claim for notice pay included at paragraph 8.1 and notice pay is not mentioned in the body of the claim form. In the circumstances this was a new claim, although given the facts pleaded it was a relabelling rather than an entirely new claim. I applied the principles set out in *Selkent Bus Co Ltd v Moore*

[1996] IRLR 661. Although this was a relabelling the application had been made very late in the day and took the respondent by surprise. I note that the question of wrongful dismissal was not dealt with in the claimant's witness statement nor in the Schedule of Loss filed the evening before the hearing. I accepted Mr Griffiths' submission that the respondent would be prejudiced by the late amendment. The legal tests to be applied to unfair dismissal and wrongful dismissal are very different. In a claim for wrongful dismissal I would be required to make findings of fact as to whether there had been a repudiatory breach by the respondent, which in turn would require me to make findings as to what in fact occurred and whether there was misconduct rather than considering whether the dismissal was within the overall range of reasonable responses. In considering the balance of injustice and hardship which would be caused to both parties, I considered that the claimant is less prejudiced as he maintains a claim for compensation for unfair dismissal in relation to the notice period. In the circumstances I considered that the amendment should not be allowed.

3. It was decided at the outset of the hearing to hear evidence on liability first and to deal with remedy afterwards if required.

Facts

4. The respondent is a bus company employing around 2,500 people. The claimant was employed by the respondent as a driver from 1 August 2015 to 12 February 2020 when he was dismissed without notice.

5. On 17 January 2020 an incident arose when the claimant was driving his bus along route number 24 on Hampstead Road. There was a vehicle in front of him blocking the bus lane, so he sounded his horn. The vehicle moved over and the claimant proceeded forward and stopped at the next bus stop. He loaded and unloaded passengers then moved on. At the next bus stop the driver of the vehicle pulled up next to him and accused him of damaging his vehicle. The claimant said he had not hit the vehicle and that the driver should not have been in the bus lane in the first place. The driver then drove off without exchanging details.

6. On the same day a complaint was made by the driver of the vehicle to the respondent. The driver alleged that his vehicle had been scratched. He stated he would be sending photographs to Transport for London ('TfL') and the respondent.

7. On 21 January 2020 the claimant was invited to a fact finding meeting with his manager, Mr Richard Taggert, on 24 January 2020. He carried out his normal duties for two days.

8. At the fact finding meeting the claimant was told that a complaint had been made. He realised that Mr Taggert was discussing the incident on 17 January 2020 and discussed what had happened. I find that the minutes of the meeting are not accurate, in that they did not record that when first asked whether he thought there was a near miss, the claimant said no. He

was then asked again and said maybe. The claimant confirmed in evidence today that maybe was the correct answer at the time, though he understands now that the incident should have been considered a near miss. During this meeting the claimant was shown CCTV footage of the incident. Mr Taggert believed that there was contact between the vehicles. He advised that he would be forwarding the matter on to a formal disciplinary for the following allegations:

(i) Failure to report an incident (third party claim following possible contact made between bus and third party); and
(ii) Blameworthy or avoidable collision.

9. Mr Taggert then suspended the claimant on full pay pending investigations. When asked at the appeal stage why he had done this, he is reported to have said that he thought there was a possibility that the claimant might reoffend.

10. Mr Taggert sent a letter to the claimant dated 24 January 2020 inviting him to attend a disciplinary meeting. By this stage however the second allegation had been dropped. The claimant was invited to be accompanied and was warned that if gross misconduct was proven he may be issued with a sanction up to and including summary dismissal.

11. The disciplinary hearing was held on 5 February 2020 and was chaired by Mr Martin Moran. The claimant attended with a union representative, Ms Teresa Emerson.

12. During the hearing Ms Emerson asked when they would be watching CCTV. Ms Emerson had not been given the opportunity to see the footage in advance of the hearing. When the footage was viewed it was with Mr Moran present, both so he could operate the technology and so as to ensure there was no breach of data protection law, as the footage contained images of passengers. The claimant and Ms Emerson did not believe that the footage showed there had been a collision. Mr Moran thought there might have been a minimal collision but accepted in cross examination that it wasn't clear whether contact had been made. The camera was 10 metres back and it was dark.

13. The claimant was asked during the hearing what he would do differently in the future. He replied that he would follow advice and report the incident. However he did note that there were many near misses every day.

14. Ms Emerson put forward mitigating circumstances for Mr Moran to consider, including the claimant having no previous disciplinary record and that he had been with the respondent almost five years. She referred to the disciplinary policy and noted there had been no collision or injury and therefore the matter should not be considered gross misconduct.

15. Mr Moran adjourned the hearing to see whether photographs could be obtained from the third party. By 12 February 2020 these had not arrived, so he reviewed the evidence and made a decision based on what he had.

16. He determined that the claimant should be dismissed. He found that the claimant should have reported the incident and that not doing so had placed the respondent at risk. He also considered that the claimant had misled him in relation to a passenger whom the claimant had said had spoken to him at the time of the incident, saying the third party driver was an idiot. This could not be found on the CCTV footage.

17. In his outcome letter dated 12 February 2020 Mr Moran detailed his reasons for dismissal. He stated that he deemed the matter to be gross misconduct. When asked what he meant by this he stated in evidence that a failure to report was listed as gross misconduct. I find that he relied on the respondent's disciplinary policy and did not consider for himself whether the matter was sufficiently serious to amount to gross misconduct in all the circumstances. He accepted in evidence that a failure to report a near miss was misconduct, not gross misconduct. He also accepted that he did not take into account the claimant's clean disciplinary record or the fact that the claimant had shown he was willing to report incidents in the past in his decision letter. I find that he did not give real consideration to those matters when considering whether or not to dismiss.

18. The claimant appealed the decision to dismiss. The appeal was heard by Ms Stephanie Achief. Three general headings were raised, namely the facts of the matter, procedural error and the severity of the award. Ms Achief considered the first two issues but accepted in cross examination that she had not given consideration to the severity of the punishment. She considered that the failure to report a near miss was gross misconduct.

Issues and law

19. The following issues arise:

    (i) What was the reason for dismissal? Was it a potentially fair reason within the meaning of section 98 Employment Rights Act 1996? The respondent contends the reason for dismissal was conduct.

    (ii) Was dismissal within a range of reasonable responses and was it fair or unfair in all the circumstances, having regard to the size and administrative resources of the respondent? The following are relevant matters applying the test in *British Home Stores v Burchell* [1978] ICR 303.

    (iii) Did the respondent hold a reasonable belief that the claimant had committed gross misconduct?

    (iv) Did the respondent conduct a reasonable investigation? The claimant contends that:

(a) There was a failure to check the bus for damage;
(b) There was a failure to obtain photographs

(v) Did the respondent adopt a reasonable procedure? The claimant contends that:

(a) He was unfairly suspended
(b) His representative was denied access to CCTV footage before the disciplinary hearing
(c) He was denied privacy to view the CCTV footage

(vi) If the dismissal was unfair, should damages awarded to the claimant be reduced on the basis that had a fair procedure been adopted he would nevertheless have been dismissed (*Polkey*)?

(vii) If the dismissal was unfair, should damages awarded to the claimant be reduced on the basis of the claimant's contributory fault?

(viii) As an issue of remedy, should the claimant be reinstated?

(a) Does the claimant wish to be reinstated;
(b) Is it practicable for the employer to comply with an order for reinstatement;
(c) Would it be just to order reinstatement?

20. I received a Skeleton Argument from Mr Baker and was referred to the following authorities:

Iceland Frozen Foods Ltd v Jones [1983] ICR 17;
Elston v Robbie's Photographic Ltd UKEAT/0282/18/RN, which refers to the decision in *Burdett v Aviva Employment Services Ltd* UKEAT/0439/13. In short, I am reminded that without falling into a substitution mind-set it will be for the Tribunal to assess whether the conduct in question was capable of amounting to gross misconduct;
Bowater v NW London Hospital Trust [2011] IRLR 331;
Newbound v Thames Water Utilities Ltd [2015] IRLR 734;
Paul v East Surrey District Health Authority [1995] IRLR 305;
Burchell as previously mentioned. I am invited to apply *Burchell* but with the caveat that the claimant contends it was wrongly decided, and that if the claimant did not breach his contract by his actions on the relevant date, his dismissal cannot have been fair. I am bound to follow *Foley v Post Office* [2000] ICR 1283 which endorses the *Burchell* test. I do consider however, as invited to do so by Mr Griffiths, that the elements set out in the *Burchell* test are themselves part of the wider question whether the dismissal fell within the band of reasonable responses in all the circumstances.

Conclusions

21. In reaching my conclusions I have considered whether, overall, the dismissal was fair or unfair in all the circumstances and whether it fell within

a band of reasonable responses at each stage of the process. I remind myself that I must not substitute my own decision for that of the respondent.

22. I find that the reason for the dismissal was conduct. Both Mr Moran and Ms Achief considered there to be misconduct and dismissed for no other reason. It is not contended that there was some other reason for the dismissal.

23. I have considered next the investigation. I find that a reasonably fair investigation was conducted. Although the bus was not checked for damage, which it could have been, that might not have been conclusive as the incident had been reported several days after the event. In any event the allegation that there had actually been a collision was dropped. I do not find it unreasonable for the respondent to have proceeded without photographs of the damage alleged to the third party vehicle. Such photographs, if they existed at all, were in the hands of the third party who could not be compelled to provide them.

24. I do not consider that the suspension of the claimant was unreasonable. Mr Taggert was of the view that there had been gross misconduct, which is a potential reason for suspension under the respondent's policies. Further he considered that there was a risk of reoffending.

25. I turn next to the disciplinary hearing and the decision of Mr Moran. The allegation before Mr Moran was 'Failure to report an incident (third party claim following possible contact made between bus and third party)'. By this time the allegation that there had actually been a collision with the third party vehicle had been removed. Mr Moran concedes that it was not clear whether there was a collision or not.

26. I find that it was reasonable for Mr Moran to conclude that there had been a near miss. By the claimant's own account he had passed within 3cm of a moving vehicle, and there was an allegation made at the scene that he had hit it. This ought to have been reported in accordance with section 4.1.4 of the respondent's employee handbook. However I do not find that the failure to report a near miss could reasonably be read as constituting gross misconduct under the respondent's policies. I have considered carefully the respondent's policy on gross misconduct which cites that failure to report a collision or injury is an example of gross misconduct. There is no mention of failure to report a near miss in this section. I do not consider it a fair reading of the policy to suggest that this includes failure to report a near miss. A near miss and an actual collision are different and one is less serious than the other. Mr Moran conceded in his evidence that failure to report a near miss was misconduct, not gross misconduct. Breach of company policies is cited as misconduct only. Mr Moran appeared to rely on this part of the disciplinary policy when the allegation actually made against the claimant was somewhat different. In the circumstances I cannot find that Mr Moran was reasonable in finding that there had been gross misconduct, as opposed to misconduct.

27. I find Mr Moran did not give proper consideration to the mitigating factors put forward by Ms Emerson. In particular he did not give proper consideration to the claimant's clean disciplinary record or his length of service, which are factors he ought to have considered. There was also a failure to take into account the fact that the claimant had reported matters previously, which tended to indicate if he had thought there was a collision he would have reported it, and the fact that the claimant indicated that he would report such incidents in the future.

28. I do not consider it to have been unreasonable for Mr Moran not to have provided CCTV footage in advance, as this would have had data protection implications. Nor was it unreasonable for him to view it together with the claimant and Ms Emerson in the hearing, as this was necessary as a matter of practicality as he knew how to operate the technology.

29. I then consider whether the failings made at the disciplinary stage were cured on appeal. I find they were not. Ms Achief also deemed a failure to report a near miss to be gross misconduct, which I find was not reasonable for the same reasons as set out previously. While Ms Achief did give consideration to two of the matters put forward she did not give proper consideration to the most important feature of the appeal, which was whether the sanction applied was too harsh.

30. I take all this into account when considering whether dismissal was within a band of reasonable responses. As submitted by Mr Baker, the band of reasonable responses is not infinite. I find that in this case the actions of the respondent fell outside of the band of reasonable responses at that the decision to dismiss was both procedurally and substantively unfair. The claim therefore succeeds.

31. I have considered whether the claimant would have been dismissed if the procedural unfairness was rectified. I cannot say that he would have been. I am not invited to make any particular reduction and I do not consider that it would be just and equitable to make any reduction on the basis of *Polkey* in this case.

32. I go on to consider contributory fault. I do find that there was some misconduct on the part of the claimant. He accepted at the disciplinary stage that he ought to have reported the incident, which would be misconduct under the respondent's policies. However it is important to consider the claimant's level of culpability. The respondent's policies are not clear as to what a near miss is, and it is plain the claimant was somewhat confused as to what ought to have been reported. In the circumstances I find that there is a relatively low level of contribution in this case and I reduce any compensatory award by 10%.

33. This matter will now proceed to a remedy hearing to determine the level of compensation which will be payable to the claimant and whether or not he should be reinstated. The parties are asked that any updated Schedules of Loss or updated witness evidence is filed and served by 5 August 2021.

Case No: 2301861/2020

Employment Judge Keogh

30 June 2021