



# EMPLOYMENT TRIBUNALS

## Claimant

Mr L Keyes

## Respondent

B & L Equipment Ltd  
(trading as DHL Parcel UK)

v

**Heard at:** Cambridge

**On:** 18 & 19 October 2021

**Before:** Employment Judge S Moore  
Mr S. Holford  
Ms W. Smith

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr N Ingram

This has been a hybrid hearing to which the parties did not object. The remote part of the hearing was CVP. A full face-to-face hearing was not held because it was not practicable and all matters could be determined in a hybrid hearing.

## JUDGMENT

- (1) The claim for unfair dismissal is dismissed.**
- (2) The claim for direct race discrimination is dismissed.**

## REASONS

1. This is a claim for unfair dismissal, and direct race discrimination under section 13 of the Equality Act 2010. We heard evidence from the Claimant and, for the Respondent, from Mr C Gerrard (Site Manager), and we were also referred to a bundle of documents each from the Claimant and the Respondent, and an audio recording.

### The Procedural Background

2. The case has a relatively lengthy procedural history.
3. In November 2019 a default judgment was entered for the Claimant in respect of his claim of unfair dismissal (but not race discrimination) because the Respondent had failed to submit a response.
4. On 16 December 2019 that default judgment was set aside and the case set down for hearing on 3 & 4 June 2020.
5. That substantive hearing was converted to a telephone directions hearing, by reason of the Covid-19 Pandemic, and at that hearing on 3 June 2020 the substantive hearing was adjourned to 15 & 16 April 2021. Further, the issues to be determined at the adjourned substantive hearing were identified as follows:

“Unfair Dismissal

What was the principal reason for the claimant’s dismissal and was it a potentially fair one (in accordance with sections 98(1) and (2) of the Employment Rights Act 1996)? The respondent asserts the reason was the claimant’s conduct in failing to attend work on 14 March 2019. The claimant asserts the reason was his race (Black British) and that others who are white had done worse things but not been dismissed. He relies on the comparators of Chris Steele, Steve Cox and Dave McCarthy.

Direct Race Discrimination

Was the claimant treated less favourably because of his race than the respondent treated or would treat others (contrary to section 13 of the Equality Act 2010) by:

- (i) Dismissing him for not attending work on 14 March 2019; and/or
  - (ii) Failing to give him a pay rise? In this respect the claimant relies on the comparator of Dave Williams.”
6. On 14 April 2021 the Claimant made an application for the substantive hearing to be adjourned and did not attend the hearing the following day. The Respondent attended but failed to provide any documentation. The matter was therefore adjourned to 18 & 19 October 2021.
  7. On 13 May 2021 the Claimant wrote to the Tribunal asking for an order that the Respondent disclose certain categories of documents and also that a particular individual, who had accompanied him to his disciplinary hearing (Mr Bloomfield) be ordered to attend the Tribunal hearing.
  8. On 28 August 2021 the Tribunal responded, asking the Claimant to explain the relevance of the documents in question, the need for Mr Bloomfield to

attend and what steps he had taken to arrange for Mr Bloomfield to attend the Tribunal voluntarily. The Claimant did not reply.

9. At the outset of the hearing on 18 & 19 October 2020 Mr Holford declared (in the presence of the parties) a potential conflict of interest in that between 1999 and 2012 he had worked for DHL, in particular he had worked as a Trade Union convener in Corby. The Respondent is a franchise of a division of DHL, however Mr Holford said he had never had any connections with the Respondent and, since 2012, no contact with DHL either. Neither the Claimant nor the Respondent had any objection to Mr Holford sitting on the case, and I took the view that Mr Holford's potential connection with the Respondent was too indirect and historical for a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased.

### **The Facts**

10. The Claimant was employed as a Collection and Delivery Driver for the Respondent, collecting and delivering parcels in accordance with the particular route he was given on any particular day.
11. On 8 November 2018 he given a final written warning (FWW), to remain on his file for 6 months, for walking out of work without completing his contracted duties. The letter informing of him of the FWW stated that with immediate effect he was expected to attend work on time and complete his contracted duties in line with company policy. The letter further said that the likely consequence of further misconduct or insufficient improvement was likely to be dismissal. The Claimant was informed he had a right of appeal against that decision, but he did not appeal.
12. On 14 March 2019 the Claimant telephoned the depot to find out what route he had been allocated for the day, and on being told the route, was reported by the call-taker as swearing and then stating, "he would rather spend the day in bed with his girl" and he would "see you tomorrow".
13. A disciplinary meeting was held on 19 March 2019. The Claimant was accompanied by Mr Adam Bloomfield. The chair of the meeting was Mr Chris Garrard and Mr Ingram, Sales Manager, was present as a note-taker.
14. The notes record, amongst other things:

CG: "You are here because you allegedly uncharacteristically phoned the depot to find out what work you had and when told, you didn't like it so you said you wouldn't be coming in."

....

LK: "Have you got the recording of my phone call? My choice of wording was wrong – if I'd said I was sick, then we wouldn't be here."

...

CG: "You were not sick. Allegedly you wanted to spend the day in bed with your partner instead of coming to do a day's work."

LK: "Rob took the message wrong."

....

LK: "I am here because I didn't say I was sick. Why am I here?"

...

LK: "I think I am here because people are going to be losing their jobs."

...

LK: "What was alleged that I said?"

CG: "I'm not doing that; I'll see you tomorrow."

...

CG: "Were you on holiday?"

LK: "No, I was with my girl. I'm here because I didn't say I was sick. My first unauthorised absence. I'm being singled out. You're saying I should have lied."

CG: "Were you sick on Thursday?"

LK: 'A little'

CG: 'Why didn't you phone in sick then?'

LK: "I should have said I was sick, then I wouldn't be sitting here."

15. The Claimant was subsequently dismissed. The dismissal letter of 19 March 2019 states: "You were absent without authorisation or sickness on Thursday 14 March 2019 despite you being issued with a final written warning in November 2018, whereby you were informed that failure to attend work within the following six months would likely result in dismissal. No valid reason for your unauthorised absence was offered during your disciplinary hearing."

16. The Claimant appealed and his appeal was heard by Mr Glen Greenaway. The Claimant's grounds of appeal were that he felt he had been "railroaded" and bullied at the disciplinary hearing, that he had not had a chance to say his points and that the hearing had been recorded without his consent (although that recording had subsequently been deleted). It was agreed that the Claimant could record the appeal hearing and in the Tribunal we heard that full recording, which lasted approximately fifty minutes. In the recording the Claimant says that on 13 March 2019 he did the "Bury route" and made 95 deliveries, that he phoned on 14 March 2019 to find out what route he had that day and on being told it was the same route again, said he would "see you tomorrow". The Claimant said he thought he was being dismissed

because two weeks earlier the Respondent had lost a big customer (Music Sales Group) and he had been told at the time that that would cost jobs, and further that he was being singled out when other people took time off by calling in sick, and that the reason he had walked off his duties in November 2018 was because he was being asked to go out in a vehicle that was above the correct payload.

17. The Claimant's appeal was dismissed.
18. In evidence the Claimant said that he wasn't well on 14 March 2019, that he was feeling "woozy" and that he told Mr Robert Stevens, of the Respondent, that he said he wasn't feeling well in the phone call. As regards the notes of the hearing, he said they had been manipulated and/or that in the place where he said he was "with his girl" he was being sarcastic because he knew that the Respondent was not listening to him and he had decided to "cut his losses".
19. Mr Garrard says that on the morning of 14 March 2019 he had been told that Robert Stevens had taken a call from the Claimant and recorded him as being absent without authorisation. Mr Stevens had told someone called Ms Amelia Walsh what had happened and when Mr Garrard spoke to Ms Walsh, Ms Walsh told him that the Claimant had called in, asked what job he was doing and when told, had sworn, and said, 'I'm not doing that, I'm spending the day in bed with my girl.'
20. We prefer the Respondent's version of events and do not accept that the Claimant told Mr Stevens that he was sick or ill, and that that was the reason why he wasn't coming in to work.
21. First, the notes of the disciplinary hearing refer in multiple places to the Claimant admitting that he had *not* said he was sick, stating "if I had said I was sick....I should have said I was sick...I'm here because I didn't say I was sick..."
22. Secondly, in the appeal hearing, of which we heard the entirety and which consists almost entirely of the Claimant speaking, the Claimant makes no mention at all to being sick on 14 March 2019.
23. Thirdly, in the appeal hearing, when describing in his own words his particular conversation with Mr Stevens on 14 March 2019, the Claimant says that when he was told his route for the day he then said to Mr Stevens, "see you tomorrow".
24. Fourthly, no reason has been suggested as to why Mr Stevens would deliberately try to get the Claimant into trouble, and in particular would fabricate what the Claimant had told him on the phone or mislead the Respondent's managers.

## **Conclusions**

**(1) Unfair dismissal**

25. The reason relied for dismissal relied on by the Respondent is misconduct, namely unauthorised absence, which is a potentially fair reason within s. 98 Employment Rights Act 1996 (ERA).
26. The Claimant says that this was not the real reason for his dismissal and that the real reason was that the Respondent had lost a contract with a major customer two weeks earlier (Music Sales Group) and/or that he is a black man.
27. We do not accept this contention.
28. First, in the light of our findings above, the Claimant was indeed absent on 14 March 2019 without authorisation.
29. Secondly, there is no evidence the loss of the Music Sales Group contract had impacted the work available for the Claimant (or anyone else)
30. Thirdly no evidence has been put forward of any white comparator (or anyone else) being treated differently from the Claimant in similar circumstances. When the point was put (in general terms) to Mr Gerrard, Mr Gerrard said that some drivers were self-employed and could therefore choose whether to accept work or not, while other employed drivers had sometimes not attended work on grounds of sickness. However the Claimant had not said he was sick, but simply that he did not want to come into work and that he (Mr Gerrard) could not run a business whereby his employees could simply decide not to come into work for unauthorised reasons. We accept Mr Gerrard's evidence in this respect, there is no evidence before us that the Claimant was dismissed for any reason other his failure to attend work on 14 March 2019, viewed in the context of his then current FWW.
31. As regards whether the Respondent acted reasonably or unreasonably in treating the Claimant's unauthorised absence on 14 March 2019 as a sufficient reason for dismissing him, the Respondent relies on the fact that the Claimant had been given a FWW four months earlier, specifically in respect of his attendance at work.
32. In the course of the hearing the Claimant alleged that the reason he had left work on 2 November 2018 (resulting in the FWW) was that he was being required to take out a van that was above an acceptable payload, and that his complaints about his van being over the acceptable pay load were ignored while the complaints of his white colleagues were not. Mr Garrard strenuously denied that the vans were ever above the correct payload and that this had been the reason for the Claimant's absence on 2 November 2018. He stated that all the packages loaded onto vehicles were always scanned for weight and volume and that on the three occasions that the Claimant's van had been checked by VOSA it has been under payload.

33. The circumstances of the Claimant's FWW in November 2018 is not a matter we can investigate at this hearing. It did not form part of the Claimant's claim and was not identified as being relevant in the agreed list of issues. However, and in any event, there is no evidence before us to support the Claimant's assertions in this respect. There is no evidence of the Claimant or of any white comparators raising concerns about their payloads on any particular occasion(s), nor, necessarily, of the Respondent's response to any such concerns being raised. Further we note that the Claimant did not seek to appeal the decision of 8 November 2018 giving him an FWW.
34. It follows that at the date of the Claimant's disciplinary hearing on 19 March 2019 (for his unauthorised absence on 14 March 2019) there was a live FWW on this file in respect of similar misconduct in November 2018. Accordingly we find the Respondent acted reasonably in treating the Claimant's unauthorised absence on 14 March 2019 as a sufficient reason for dismissing him.
35. Finally, as regards procedural fairness, the Claimant complained about the following matters:
36. First, a colleague, Mr Chris Steele, apparently told him before the meeting that he was getting sacked. We do not consider this was evidence of a pre-determination of the matter by Mr Garrard. Mr Steele was a sub-contracted service provider who was not involved in the disciplinary hearing, and his views are likely to have been speculation based upon what it was alleged the Claimant had said to Mr Stevens in the telephone call on 14 March 2019, and Mr Steele's possible knowledge of the Claimant's existing FWW.
37. Secondly, Mr Ingram recorded the disciplinary hearing, apparently deleting the recording after the notes had been typed up. Mr Ingram should not have recorded the meeting without the Claimant's knowledge and consent; however this does not undermine the fairness of the dismissal decision.
38. Thirdly, the Claimant complains that there was a lengthy delay before he was given the minutes of the disciplinary hearing and that he did not have them prior to his appeal hearing. Although this is true, we do not consider that this undermines the fairness of the dismissal decision either. The Claimant's disciplinary hearing was conducted fairly, he was informed of the alleged misconduct, he was allowed to be accompanied at the hearing, and he was given a proper hearing and informed of his right to appeal. Further, it was clear from the dismissal letter of 19 March 2019 that the Claimant was dismissed for being absent "without authorisation or sickness on Thursday 14 March 2019". Accordingly, the Claimant didn't need to see the notes of the hearing to know that the Respondent believed he had not told Mr Stevens that he was sick. The Claimant therefore knew that if he wished to argue the contrary it would be necessary for him to pursue the point (that he had told Mr Stevens he was sick) at the appeal hearing, however he did not do so.
39. It follows the complaint of unfair dismissal is dismissed.

**(2) Race Discrimination**

40. The complaint that the Claimant's dismissal was an act of direct race discrimination is dismissed for the reasons above.
41. As regards the complaint that the Claimant was not given a pay rise and that this was an act of discrimination, the Claimant said that he thought Mr Dave Williams had been given a pay rise in about Christmas 2018, but he did not know what Mr Williams earned before or after the alleged pay rise.
42. The Respondent submitted that the Claimant had been given a salary increase on 1 April 2018 and that he was one of the highest paid Collection and Delivery Drivers. We were shown a list of drivers with their respective gross pay in February and March 2019, which places the Claimant 4<sup>th</sup> from the top (listed in order of amount of pay) of a list of 16 drivers.
43. In the circumstances there is no evidence that the Respondent treated the Claimant less favourably on grounds of his race by paying him less than other drivers and/or failing to give him a pay rise, and this complaint of race discrimination is also dismissed.

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Employment Judge S Moore

Date: 19 October 2021.....

Sent to the parties on: ..

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For the Tribunal Office