



EMPLOYMENT TRIBUNALS

Claimant: Mr A Egenti

Respondent: Abellio London Limited

Heard at: London South - Croydon (CVP)

On: 21 March 2023

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person

Respondent: Mr W Griffiths - Counsel

JUDGMENT

1. The claim for unfair dismissal is dismissed.
2. The claim for “other payments” (breach of contract) is dismissed upon withdrawal.

REASONS

Introduction

1. For ease of reading, I refer to the claimant as Mr Egenti and the respondent as Abellio.
2. Mr Egenti was employed by Abellio as a bus driver from 9 November 2019 until 3 December 2021 when he was summarily dismissed. The respondent says that Mr Egenti was guilty of gross misconduct. After a period of early conciliation which started on 22 February 2022 and ended on 24 February 2022, he presented claims of unfair dismissal and “other payments” (breach of contract) to the Tribunal on 13 March 2022. At the hearing, he withdrew his claim for breach of contract which I dismissed upon withdrawal.
3. At the hearing, we worked from a digital bundle. We also watched four CCTV clips taken from the cameras in the bus that Mr Egenti was driving on the date

of the alleged acts of gross misconduct. The following people adopted their witness statements and gave oral evidence in this order:

- a. Mr Richard Teggart
- b. Mr Martin Moran
- c. Ms Tayo Fanibi
- d. Mr Egenti

Mr Egenti and Mr Griffiths made closing submissions and I reserved judgment.

4. The issues that I must determine are as follows:
 - a. What was the reason or principal reason for dismissal? Abellio says the reason was conduct. The Tribunal will need to decide whether the Abellio genuinely believed Mr Egenti had committed misconduct.
 - b. If the reason was misconduct, did Abellio act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - i. there were reasonable grounds for that belief;
 - ii. at the time the belief was formed Abellio had carried out a reasonable investigation;
 - iii. Abellio otherwise acted in a procedurally fair manner;
 - iv. dismissal was within the range of reasonable responses.
5. Mr Egenti must establish his claim on a balance of probabilities.
6. In reaching my decision, I have considered the oral and documentary evidence. The fact that I have not referred to every document produced in the bundle should not be taken to mean that I have not considered it.

Findings of fact

7. Abellio is a private limited company which operates public transport services across central, south, and west London. It operates over 600 buses across the area in excess of 40 routes and employs approximately 2500 people. The following people at Abellio are relevant to Mr Egenti's claim:
 - a. Mr Richard Teggart - Driver Manager and Mr Egenti's line manager. He was the investigating officer.
 - b. Mr Martin Moran - Operations Manager. He was the disciplinary officer.
 - c. Ms Tayo Fanibi - Employee Relations Manager. She was the appeal officer.
 - d. Mr Sagur Gurung – the Unite representative who accompanied Mr Egenti at the disciplinary hearing.
 - e. Mr Guy Langston – the Unite Representative who accompanied Mr Egenti at the appeal hearing.

8. Mr Egenti was originally employed by London United Busways (“London United”). His employment was transferred to Abellio under the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 9 November 2019. His employment as a bus driver initially started with London United on 4 November 2017. He was issued with a contract of employment [28]. Clause 19 of his contract of employment provides that Abellio could dismiss Mr Egenti without notice if he was found guilty of gross misconduct or gross negligence in accordance with the company’s disciplinary procedure.
9. Abellio operates a Disciplinary Policy & Procedure [38]. Clause 4 provides, amongst other things:

Gross misconduct is a serious breach of contract and includes conduct which in the Company’s opinion is likely to prejudice its business or reputation, or irreparably damage the working relationship between an employee and the Company.

*The following are some examples of gross misconduct. These are intended only as a guide and this is **not** an exhaustive list:*

- *Dangerous driving e.g. excessive speeding, red light offences*

10. Mr Egenti suggested that he had never seen the Disciplinary Policy & Procedure. I find that hard to believe given the length of time that he had worked at Abellio. It is a large organisation in such policies are either given in hardcopy to employees or are made available on the company intranet. However, even if that is correct, he would have known that excessive speeding and running a red light were serious matters and it does not require him to be informed of that fact by a disciplinary policy. As a PSV license holder he would have been aware that he was required to drive within the national speed limits and to wait at red lights until the change to green. These are requirements that apply to all motorists and are set out in the Highway code.
11. Abellio has a handbook. Section 5 relates to bus drivers [49]. Section 5.5 deals with safe and considerate driving. In section 5.5.1 drivers are reminded to be “alert at all times and warned of the dangers of excessive speed. You must observe speed limits.” Section 5.5.1 provides that drivers must “ease of when approaching green traffic lights.”
12. In 2013 the London Borough of Camden decided to designate a 20 mile an hour speed limit in all Borough roads not already subject to that speed limit. It issued the Camden (20 mph Speed Limit) (Amendment No. 1) Traffic Order 2021 with the effect all other Borough roads not already subject to that speed limit were so included [110].
13. On 20 January 2021, Westminster Council introduced a mandatory 20 mile an hour speed limit and issued a notice to that effect [107].
14. On 8 November 2021, a customer complained to Abellio about Mr Egenti’s alleged inappropriate behaviour on 5 November 2021 [105]. The complaint was noted as follows:

Customer got on board and just as she was about to get a seat, driver moved the bus aggressively. Customer then hit her back on the disabled blue Bell. Driver came out of cabin screaming at customer about why she pressed the bell, driver did not take time to find out what happened.

Customer is elderly and more like this to be looked into.

15. Mr Teggart chaired an investigatory meeting with Mr Egenti on 11 November 2021. The meeting started at 15:39 hours and ended at 17:46 hours. A copy of the notes of that meeting were produced to the Tribunal [94]. Mr Egenti has signed these notes confirming that they are a factual account of the conversation that took place. Mr Teggart and Mr Egenti viewed the CCTV footage together. This footage is uncontroversial and clearly shows what happened and the times of each alleged incident. It goes beyond the complaint made by the customer and also includes other matters such as evidence of driving in excess of the 20 mile an hour speed limit and running a red light.
16. After the meeting, Mr Teggart wrote to Mr Egenti on the 11 November 2021 [101]. He confirmed that he had suspended Mr Egenti to enable further investigations to be conducted.
17. On 18 November 2021, Mr Teggart wrote to Mr Egenti to invite him to a disciplinary hearing which was originally scheduled for 24 November 2021 but was re-scheduled for 2 December 2021 [103]. The allegations against Mr Egenti were as follows:
 - *Dangerous driving (driving with excessive speed).*
 - *Dangerous driving (contravention of a red traffic light signal).*
 - *Bringing the Company into disrepute (use of abusive language towards a member of the public (workman in hi viz outfit)).*
 - *Failure to achieve and maintain the required standards of performance (failure to allow passengers sufficient time to reach a safe place before pulling off).*
 - *Conduct likely to give offence to customers (leaving the cab to confront a passenger for pressing the disabled bell).*

These additional allegations arose after Mr Teggart had reviewed the CCTV footage when investigating the complaint from the customer concerning the disabled bell.

18. On 2 December 2021, Mr Moran chaired the disciplinary hearing. Mr Egenti and Mr Gurung attended the hearing. A copy of the minutes of the hearing have been produced to the Tribunal [111]. These notes reveal that Mr Egenti was given a proper opportunity to understand the allegations that have been made against him and to make representations.
19. On 6 December 2021, Mr Moran wrote to Mr Egenti to notify him that he had decided to dismiss Mr Egenti without notice for gross misconduct. In summary the outcome in relation to each of the allegations was as follows:
 - a. Dangerous driving (driving with excessive speed). Charge proven.

- b. Dangerous driving (contravention of a red traffic light signal). Charge proven.
- c. Bringing the Company into disrepute (use of abusive language towards a worker). Use of abusive language - charge proven. Bringing Company into disrepute - charge not proven.
- d. Failure to achieve and maintain the required standards of performance (failure to allow passengers sufficient time to reach a safe place before pulling off). Charge proven.
- e. Conduct likely to give offence to customers (leaving the cab to confront a passenger for pressing the disabled bell). Charge proven.

20. In the letter I note the operative reason why Mr Moran decided that dismissal was an appropriate sanction. He states:

My decision to dismiss in relation to the red-light contravention was cemented by what I had observed on CCTV in relation to your speeding, lack of concern for your passengers in not allowing them time to make themselves safe and belief that you must drive in essence, to chase the bus ahead regardless of the consequences. I deem you to be a danger to others and I am not comfortable in allowing you back on the road based on the evidence presented to me.

I also note that Mr Moran considered alternatives to dismissal such as demotion. However, this was not deemed appropriate because there were no alternative positions at a grade lower than a driver. Mr Moran notified Mr Egenti of his right of appeal.

21. Mr Egenti appealed the decision in writing [122]. The grounds of appeal were as follows:

- a. The sanction was too harsh and should be reduced to allow for reinstatement.
- b. He had not been aware of the red light changing and believed he had made a safe decision fully considering passengers, other motorists, and himself.
- c. The speed limit was not 20MPH and he had been instructed by an iBus controller to catch up with a lead driver.
- d. The severity of the sanction was not in keeping with other similar case outcomes.

22. Ms Fanibi was appointed to hear the appeal. The appeal hearing was conducted on 1 February 2022. Mr Egenti was accompanied by Mr Langston. Ginette Uthayakumar took notes. A copy of the minutes of the hearing was produced to the Tribunal [128]. In her oral evidence, Ms Fanibi confirmed that she was provided with an appeal pack comprising the documents that had been prepared as part of the investigation and the disciplinary hearing minutes and outcome. She also had the CCTV footage which he reviewed. I am satisfied on reading the notes of the appeal hearing that Mr Egenti was given an adequate

opportunity to state his case and any mitigating circumstances. He also provided further information regarding the data in his cab in what is known as the MDT which is a digital screen which contains instructions concerning how the bus should be driven in order to maintain the correct distance between the bus ahead driving the same route [131]. The information that he provided did not relate to the date of the alleged incident. It was, however, considered by Ms Fanibi before she reached her decision.

23. On 13 April 2022, Ms Fanibi wrote to Mr Egenti to confirm that his appeal had been unsuccessful and that the original decision to dismiss him stood.

24. During his oral evidence under cross examination, Mr Egenti conceded the following key facts:

- a. He accepted that he ran a red light on the day of the alleged incident. In mitigation, he said that it was a temporary traffic light and he believed that he was entitled to do so and was acting on instructions provided by Abellio which would permit such behaviour in circumstances such as where the light had suddenly changed back to red after a very short interval or if it was “stuck” on red. He has not provided any supporting evidence in this regard and I find it surprising that Abellio would issue such an instruction in circumstances where stopping at a red light is mandatory.
- b. He accepted that he had driven at 28 mph on occasion on the day of the incident. In his defence, he said that he did not know that the 20 mph speed limit was operational. He thought that the 30 mph speed limit was operational. That is incorrect. Speed limits in inner London had been reduced to 20 mph before the day in question. It is no defence to plead ignorance of the law and it was incumbent upon Mr Egenti to drive within the mandatory speed limit. This applies to all motorists. I am also not satisfied that he has established his claim that there was a practice in place to force drivers to exceed the speed limit so that they could maintain five bars on the MDT as the indication of being the right distance behind the bus that was driving in front of him on the same route.
- c. He accepted that the CCTV footage was an accurate account and record of what had happened 5 November 2021.

Applicable law

25. The circumstances under which an employee is dismissed are set out in the Employment Rights Act 1996, section 95 (“ERA”). The fairness of a dismissal is set out in ERA section 98.

26. Abellio must show that misconduct was the reason for the dismissal. According to the Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303**, a threefold test applies. Mr Egenti must show that:

- a. It believed that Mr Egenti was guilty of misconduct;
- b. it had in mind reasonable grounds upon which to sustain that belief; and

- c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

This means that Abellio need not have conclusive direct proof of Mr Egenti's misconduct; only a genuine and reasonable belief, reasonably test.

27. The Acas Code states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, i.e. conduct that it considers serious enough to justify summary dismissal (see para 24). The Code suggests this might include theft or fraud, physical violence, gross negligence or serious insubordination. Although there are some types of misconduct that may universally be seen as gross misconduct, such as theft or violence, others may vary according to the nature of the organisation and what it does. In workplaces with significant health and safety risks, for example, any breach of a health and safety procedure may be viewed as gross misconduct justifying dismissal, whereas a similar breach in a workplace where workers are not exposed to the same level of risk may warrant only a warning. If an employer views certain behaviour as very serious and capable of amounting to gross misconduct because of the nature of the business but that behaviour might not be viewed in the same way elsewhere, it is particularly important to include it in the disciplinary rules so that employees are well aware of that fact.
28. The Tribunal does not necessarily have to consider whether Mr Egenti's conduct amounts to gross misconduct in the contractual sense. In **Hope v British Medical Association 2022 IRLR 206, EAT**, the EAT upheld an employment tribunal's decision that H was fairly dismissed for gross misconduct for bringing numerous vexatious and frivolous grievances which he refused to progress or withdraw. Mr Justice Choudhury, President of the EAT, held that the test for determining whether a dismissal is fair or unfair within the meaning of section 98(4) ERA involves consideration of all the circumstances, which might, in some misconduct cases, include the fact that the conduct relied on involved a breach of contract amounting to gross misconduct. However, **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** was not authority for the proposition that whenever the label 'gross misconduct' is used, a contractual analysis is required as to whether the conduct amounted to willful contradiction of the contract or gross negligence. The need for the contractual analysis in that case arose only because the misconduct relied upon was said to be in breach of policy, such breach having been contractually stipulated to amount to gross misconduct. In the instant case, no contractual analysis was necessary: the claim was not one of wrongful dismissal and BMA did not seek to rely on any contractually stipulated act as amounting to gross misconduct. The tribunal had been entitled to find that BMA had acted reasonably in treating the reason for dismissal, namely H's conduct as described, as being a sufficient reason to dismiss in all the circumstances.
29. Even where gross misconduct may justify summary dismissal, an employer suspecting an employee of such conduct should still follow a fair procedure, including a full investigation of the facts. If an employer does establish a reasonable belief that the employee is guilty of the misconduct in question, it must still hold a meeting and hear the employee's case, including any mitigating circumstances that might lead to a lesser sanction. Accordingly, even if the employee has committed an act of gross misconduct, the fairness or otherwise

of any subsequent dismissal remains to be determined in accordance with the statutory test in S.98(4) ERA.

30. The Tribunal has to decide whether Abellio's decision to dismiss Mr Egenti fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**). For the purposes of that test, it is irrelevant whether or not the Tribunal would have dismissed Mr Egenti if it had been in Abellio's shoes. The Tribunal must not "substitute its view" for that of Abellio.

Discussion and conclusion

31. There is no suggestion in this case that Abellio dismissed Mr Egenti for some ulterior reason. On the evidence I am satisfied that the reason why Mr Egenti was dismissed was because of his misconduct arising from the CCTV footage including the complaint from a customer. I carefully explained to Mr Egenti that as he was making an unfair dismissal claim, it was not incumbent upon Abellio to establish that he had actually, as a matter of fact, committed acts of gross misconduct. Had Mr Egenti pursued a claim of wrongful dismissal (i.e. breach of a contract duty to dismiss with notice) arising from his summary dismissal, Abellio would have been put to proof of the underlying gross misconduct to justify dismissing him without notice. This is not such a case nor is it an opportunity for Mr Egenti to clear his name. What I must do is examine the fairness of the process to determine whether Abellio had reasonable grounds for believing that Mr Egenti was guilty of gross misconduct and then assess the reasonableness of the sanction that was applied.
32. Abellio has a disciplinary procedure which lists examples of gross misconduct which includes dangerous driving e.g. excessive speeding, red light offences. Mr Egenti has admitted that he was driving in excess of the 20 mph speed limit and he ran a red light.
33. I am satisfied there were reasonable grounds for Abellio's belief that Mr Egenti had committed an act of misconduct. The evidence provided by the CCTV footage is reliable and having viewed it, one can see why Mr Moran believed that the charges had been established. At the time the belief was formed Abellio had carried out a reasonable investigation. Mr Teggart had interviewed Mr Egenti and both men had reviewed the CCTV footage. Mr Teggart was familiar with the disciplinary policy and the staff handbook as it applied to bus drivers. He recommended disciplinary action and Mr Moran was appointed to conduct the disciplinary hearing. I cannot fault the procedure that was followed. The case was put to Mr Egenti. He knew the charges that he had to answer, and he was given every opportunity to do so and to put forward mitigating circumstances. He was accompanied by a trade union representative. Mr Teggart considered the evidence and the representations and concluded that summary dismissal was an appropriate sanction. Thereafter, Mr Egenti appealed the decision. His appeal was heard by a different person, Ms Fanibi. She was a reliable witness, and it was clear to me that she carefully considered the material and gave Mr Egenti an opportunity to provide further evidence in support of his appeal before she reached her conclusion. Mr Griffiths made an important point that Abellio could not trust Mr Egenti to drive their buses given what was revealed by the CCTV footage. There was evidence of speeding, running a red light and a driver arguing with someone else and pulling away

from a stationary position causing a customer to come into contact with the disabled bell.

34. Dismissal was an appropriate punishment and certainly within a range of reasonable responses given the health and safety responsibility that is associated with a business that operates buses. Buses are large and potentially dangerous vehicles. The evidence before Mr Moran was that Abellio could not trust Mr Egenti to drive the bus in a safe manner.

35. The claim is dismissed.

Employment Judge Green

Date **23 March 2023**

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date **30 March 2023**

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FOR THE TRIBUNAL OFFICE