



EMPLOYMENT TRIBUNALS

Claimant: Mr Wiktor Muszanaski

Respondent: Eastbrook Logistics Ltd

Heard at: Bristol Employment Tribunal by VHS **On:** 12-13 April 2023

Before: Employment Judge Millard

Representation

Claimant: In Person

Respondent: Ms Whalen-Blake (Solicitor)

JUDGMENT

1. The claim for unfair dismissal is dismissed.

The Claimant was dismissed for a fair reason, namely gross misconduct.

REASONS

Hearing

1. The hearing was held remotely on 12-13 April 2023 with all parties attending via the VHS platform. The Claimant was not represented and had the assistance of an interpreter for both days of the hearing. The Claimant was able to understand most of the proceedings and required the interpreter for only additional assistance.
2. Mr Derrick and Mr Russell gave evidence for the Respondent.
3. The Claimant gave evidence and did not have any other witnesses to give evidence.
4. The Tribunal also had an agreed bundle consisting of 90 pages. This included the notes of the Claimant's appeal which were added to the bundle on the first morning of the hearing.

5. Judgment was given orally by the Tribunal at the end of the hearing. These written reasons are provided to assist the Claimant in understanding the judgment and reasons in this case.

Findings of Fact

6. The Employment Tribunal considered the witness evidence for both the Claimant and the Respondent, as well as the agreed bundle and made the following relevant findings of fact.
7. The Claimant is now 67 Years of age.
8. By way of a claim form dated 21 October 2022, the Claimant presented a claim for unfair dismissal.
9. The Claimant was employed by the Respondent as a driver. He commenced employment on 7 October 2016. The employment ended on 1 July 2022, when he was dismissed for gross misconduct.
10. The factual evidence in this case is largely not in dispute, in that the Claimant accepts that on 7 July 2022 he was driving a van for the Respondent when he parked outside the Red Distribution depot in Tewkesbury to go to Greggs for a coffee. Having exited the van, he then urinated on the loading dock of Red Distribution. This was captured on CCTV and witnessed by an employee of Red Distribution who immediately confronted the Claimant at the scene. A complaint was made the same day to the Respondent's Transport Manager and a copy of the CCTV footage was provided to them.
11. The Respondent accepts that this was the first issue in relation to the Claimant's conduct and that he was a good driver, who was well liked.
12. On 7 July 2022, the Claimant was returning to the Respondent's depot in Tewkesbury having made deliveries in the Croydon area. The van he was driving was black and had no identifiers on it as belonging to the Respondent. However, local people in the Tewkesbury area would have recognised the van as being the Respondent's due to its distinct black colouring; indeed the complaint about the Claimant's conduct was made the same day thereby demonstrating that the van was easily identifiable as belonging to the Respondent.
13. The Claimant's journey back from the Croydon area took in the region of 3 hours 50 minutes. The Claimant did not stop during this journey. His route took him around part of the M25, along the M4 and then up the A417. As part of that journey, he passed motorway services at Cobham, Reading, Chieveley and Membury. There were also services with toilet facilities available along the A417. These were open and the Claimant chose not to stop at any of them.
14. The Claimant was under no time pressure to get back to the depot and he would have been able to stop for a comfort break had he have chosen to do so. The Respondent had no policies or procedures in place to restrict the ability of the Claimant to stop for a break. As a driver, the Claimant was

expected to manage his own wellbeing and comfort breaks as he was in sole control of his van.

15. As he drove the Claimant drank water and kept himself hydrated. He would typically drink 3 litres of water a day.
16. When the Claimant got to Tewkesbury, it was his usual habit to go to Greggs to buy a coffee rather than return straight to the Respondent's depot. This was a few hundred yards from the Respondent's depot and around a 4–5 minute drive away. There were no toilet facilities available for customers to use at Greggs. Whereas at the depot there were toilet facilities, along with the ability to make tea and coffee.
17. During the investigation meeting which took place the day after the incident, the Claimant said that when he got to traffic lights on the main road in Tewkesbury he felt the need to urinate, but that he believed that he could hold it in (P.56). At that point, he was equal distance from both the depot and Greggs. The Claimant knowing that he needed to urinate after almost four hours of driving could have gone to the depot, however he chose to drive to Greggs instead knowing that there were no toilet facilities there. The Claimant owed his colleague Mark a coffee and along with it being his usual routine, led to his decision to go to Greggs instead of the depot despite knowing that he needed the toilet.
18. The Claimant parked on the forecourt of premises belonging to Red Distribution. This area was covered by CCTV cameras. The footage, which the Tribunal was not provided with a copy of, but which was provided to the Respondent by Red Distribution and shown to the Claimant during the investigation, showed the Claimant remain within the van for a few minutes after parking. He then exited the van and removed the padlock on the rear of the van, before urinating on the loading dock of Red Distribution.
19. The Claimant was seen at the time to do this by an employee of Red Distribution who immediately confronted him about what he had done. The Claimant denied that he had urinated on the loading dock and said that the urine was in fact a leak from the air conditioning unit. That was a lie.
20. The employee of Red Distribution made a telephone complaint shortly afterwards on the same day to the Respondent's Transport Manager. The contents of that call are recorded in an email at page 52 of the bundle. That email says the Respondent was told that one of their drivers had parked outside the Red Distribution unit and was then seen to urinate on their loading dock at the front of their vehicle. When the driver was approached about what they had done, they denied it and said that it was a leak from the air conditioning.
21. A check of the vehicle trackers by the Transport Manager confirmed that the Claimant was the driver concerned.
22. An investigation meeting was conducted by Tony Holden the following day on the 8 July. The Claimant did not require an interpreter and was able to understand what he was asked and to provide responses setting out fully his account and explanation. A copy of the transcript of that meeting is at pages

54-57 of the bundle. In that meeting the Claimant accepted urinating on the loading bay of Red Distribution and gave the following explanation,

“I needed the toilet and couldn’t find anywhere to park so I parked by a business which I thought was shut so I parked there and then wanted to go to Greggs. I couldn’t hold it anymore and had to go somewhere so did it there. I didn’t want to go there on purpose.”

23. The Claimant was asked when he realised that he needed to go to the toilet and he said, *“When I got back from the run, I knew I needed it and tried to hold it, but I just had to go.”*
24. He was asked why he did not come back to the depot, and he said that he did not have enough time.
25. He was asked if he had any medical issues and he replied, *“No, **I just was holding it for three hours’ worth of driving and had to go.**” **[Emphasis Added]**.* This account was provided the day after the incident. It is therefore close in time and accurately reflects the thinking of the Claimant at the time of the incident. It is quite clear from this account that he had been needing to go to the toilet for three hours and therefore that the need to urinate was not sudden and unexpected. Despite needing the toilet for 3 hours he had chosen not to go to the toilet during that time.
26. As already set out, the Claimant also told Mr Holden that he needed the toilet whilst he was at the traffic lights at the main road in Tewkesbury. At that point he was equal distance between the depot and Greggs. He was aware that there were toilet facilities at the depot, but none at Greggs. Despite being aware that he needed the toilet he decided to drive to Greggs rather than to the depot to use the toilet.
27. The Claimant’s account in his evidence to the Tribunal was that he did not need the toilet and that the need to urinate came on suddenly and unexpectedly when he exited the van and stood up. However, this is inconsistent with the account that he provided on the day after the incident to Mr Holden. He was aware of needing the toilet for 3 hours of his journey and chose not to use the toilets at the services he passed. He was particularly aware of his need to use the toilet at the traffic lights in Tewkesbury when he could have returned to the depot. Despite knowing this he chose to drive to Greggs where there were no toilet facilities rather than the depot which was an equal distance away and which did have toilet facilities. It cannot have come as any surprise to him that on getting out of the van that he then needed to urinate.
28. The Claimant states that he believed that Red Distribution had closed during the covid-19 pandemic and that the premises were empty. In his evidence he was also clear that he does not see the seriousness of his actions in urinating in public. The only conclusion that the Tribunal can therefore draw from this and his knowledge that he needed to urinate, was that he either parked at this location specifically in order to urinate or that he was not concerned about urinating in public if the need arose.

29. Following Mr Holden's investigation, the Claimant was sent a letter of 11 July 2022 [Pp 59-60] inviting him to a disciplinary hearing on 14 July 2022. The nature of the allegation under investigation was clear in the letter. A copy of the company's disciplinary policy and procedure was included along with the evidence that the company had obtained. The Claimant was also given the opportunity to view the CCTV footage. His right to be accompanied was also set out.
30. The disciplinary hearing in fact took place on 15 July 2022. The notes of that meeting are contained at pages 61-71 of the bundle. It was conducted by the Operations Support Manager, Mr Derrick. The Claimant did not attend with anyone despite being given the opportunity. Again, the Claimant did not require an interpreter to understand and participate fully in the hearing.
31. The Claimant was shown the CCTV footage and accepted that he had urinated on the Red Distribution loading dock. He said that in future he had identified a layby with a toilet 12 miles away and that he would go there before going to Greggs. He also said that he did not know that the company were open and that had he have known he would not have gone there. He said that the journey was a long journey of 3hrs 50minutes. In putting forward the length of the journey as mitigation for his actions he therefore recognised that there would be a need to urinate at the end of it. However, he said that the need to urinate had come on unexpectedly when he opened the padlock. This is not consistent with the recognition that the long journey would inevitably give rise to the need to urinate.
32. The Claimant was asked if he had any medical condition and he said that he did not.
33. Mr Derrick resumed the meeting on 18 July 2022, when he informed the Claimant that the conduct was "*a nasty abhorrent act*" and that he would be dismissed. Although not mentioned within the notes of that meeting [P.72], it is clear in his description of events and within his witness evidence that Mr Derrick concluded that it amounted to gross misconduct and that this was the reason for dismissal.
34. Mr Derrick wrote to the Claimant on 19 July 2022 [P.74] and informed him that the conduct amounted to gross misconduct and that his employment was terminated as of 18 July 2022. The Claimant's right to appeal was set out in the letter and the Claimant exercised that right of appeal.
35. The appeal hearing was conducted on 2 August 2022 by Mr Russell who is the Group Operations Manager for the Respondent and senior to Mr Derrick. As he was more senior it was appropriate for Mr Russell to hear the appeal and he was not influenced by his subordinate Mr Derrick. The Claimant's right to be accompanied was set out in the letter inviting him to the appeal hearing [P.76]. The date of the appeal hearing was changed to accommodate the Claimant who was on holiday on the proposed date.
36. At the appeal hearing, the Claimant presented a letter from his GP of 18 July 2022 [P.73], that the Claimant was being treated for an "*Overactive Bladder and Urge Urinary Incontinence.*" The letter also said that this impaired his ability to hold urine and can lead to sudden and involuntary urges to pass

urine. Again, the Claimant was able to fully participate and understand without an interpreter. The Claimant again put forward that the need to urinate was sudden and unexpected when he got out of the van.

37. Mr Russell considered the disciplinary evidence and the new medical evidence, provided for the first time at the appeal hearing, but did not alter the decision to dismiss.
38. Whilst the Claimant had at the time of the incident an undiagnosed overactive bladder and urge urinary incontinence, it was not the case that he was caught unawares by the need to urinate when he got out of his van. By his own account he had driven for 3hrs 50mins and for 3 of those hours he was aware of the need to urinate. In that time, he had passed a number of services where he could have stopped and used the toilet facilities. He chose not to do so. On arriving in Tewkesbury and whilst stationary at the traffic lights on the main road he stated he was aware of the need to urinate. However, rather than return to the depot and use the toilet facilities there, he made the decision to drive the same distance to Greggs to get coffee, fully aware of the need he had to urinate. This was confirmed in his account to Mr Holden the day after the incident. Therefore, it cannot be said that the Claimant was taken by surprise at the need to urinate upon getting out of his van. It was a logical outcome of driving for almost 4 hours, whilst drinking water and knowing that you need to urinate for 3 of those hours. Therefore, Mr Russell quite rightly discounted the new medical evidence as an explanation for the Claimant's conduct. The Claimant chose to go to Greggs knowing for 3 hours previously that he needed the toilet. Therefore, he either parked at Red Distribution with the intention to urinate there or in full knowledge of the risk that he might need to do so.

Reason for Dismissal

What was the reason for the dismissal?

39. The Respondent dismissed the Claimant for gross misconduct. This is a fair reason for dismissal under S.98(2)(b) of the Employment Rights Act 1996.
40. The Claimant accepted that he had urinated on the loading dock of Red Distribution. This was captured by CCTV cameras and seen by an employee of Red Distribution which led to them confronting the Claimant at the time and subsequently making a complaint to the Respondent.
41. That the Claimant was an employee of the Respondent was easily identifiable to the employee of Red Distribution and caused reputational damage to the Respondent in that a complaint about the Claimant's conduct followed almost immediately. There was also the risk of further reputational damage to the Respondent in that this took place publicly near to a Greggs take away, where members of the public were walking past. The Claimant was either unaware of his surroundings or unconcerned for them. He was not aware that the Red Distribution site was operational. He was unaware that he could be seen clearly on CCTV cameras. There was therefore the potential for other members of the public to have seen him urinating in public at the front of his van and identified him as an employee of the Respondent.

42. The Tribunal was not provided with any evidence of a specific bylaw prohibiting urination in public at this location, however, such conduct may amount to a criminal offence of Causing Harassment, Alarm or Distress, contrary to Section 5 of the Public Order Act 1986, which is punishable by a financial penalty.
43. In accordance with the test set out in **BHS v Burchell [1978] IRLR 379**, the Respondent had a reasonable belief that the Claimant was guilty of misconduct and in all the circumstances had carried out a reasonable investigation. The Claimant was caught on CCTV urinating on the Red Distribution loading dock. This CCTV had been provided to the Respondent and was shown to the Claimant. This had given rise to an immediate complaint by a local business to the Respondent about the Claimant's actions. The Claimant admitted this conduct.
44. Whilst the Claimant had provided medical evidence at the appeal stage of his Overactive Bladder and Urge Urinary Incontinence, his own evidence to the Respondent was that the urge to urinate was not sudden and unexpected. He had needed to use the toilet for three hours of his 3 hour 50 minute journey, yet chose not to use the services at all. Whilst he was in Tewkesbury at the traffic lights, he was again aware of the need to urinate, but chose to go to Greggs to get a coffee rather than to go to the depot to use the toilet. Therefore, from his own account the need to urinate could not be said to have been sudden and unexpected.

Did the Respondent Act Reasonably in Treating this as Sufficient Grounds to Dismiss?

45. As per section 98(4) of the Employment Rights Act 1996, the determination of whether a dismissal is fair or unfair depends on whether in the circumstances (including the size and administration resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing and this should be determined in accordance with the equity and substantial merits of the case.
46. This is the element to which the Claimant's claim is addressed, specifically that a verbal or written warning would have been sufficient in view of the conduct which he accepted, and which was a one off, his medical diagnosis and his previous good employment record with the Respondent.
47. It is not for the Tribunal to decide what it would have done in the circumstances. The test is as per that set out in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, specifically, did the decision to dismiss fall within the range of reasonable responses?
48. What constitutes gross misconduct is a mixed question of law and fact. As per **Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] UKEAT 32**, gross misconduct involves either deliberate wrongdoing or gross negligence. Tribunals should consider the character of the conduct and whether it was reasonable for the employer to regard it as gross misconduct.

49. In my judgment the decision to dismiss clearly fell within the range of reasonable responses. Whilst the Claimant had worked for the Respondent for 6 years with a good record and was a good driver who was well liked. The Claimant's own evidence is that he drove to Greggs fully aware that he needed the toilet and that there were no toilet facilities there. He had driven for 3hrs 50 minutes on this occasion without stopping for a break and for three hours of that journey he was aware that he needed the toilet. Having arrived at the traffic lights in Tewkesbury, he was aware of his need to use the toilet. At that point he could have driven to the depot and used the toilet there. However, he decided to drive the same distance to Greggs to get a coffee, in full knowledge that he needed the toilet. It would have come as no surprise that on exiting the van he then urgently needed the toilet. Therefore, he either went to the Red Distribution depot deliberately to urinate there believing it was closed or he went there fully aware of the risk that he would need to do so when he got there. That was his choice, a choice that he now clearly regrets making as he has apologised sincerely for it.
50. Having gone there, he then chose to urinate in public, either unaware of or not concerned of his surroundings and the risk that he would be seen doing so. Indeed, he was not aware that the Red Distribution premises were in use and he was unaware of the CCTV camera, plainly in urinating where he did on the loading dock of another company he was unconcerned about whether others could see him or not.
51. Had his actions have been reported to the police rather than his employer, then an offence contrary to section 5 of the Public Order Act 1986 would in all likelihood have been made out. There being a member of the public present at the scene who was caused harassment, alarm or distress by his urinating in public, such that they challenged him immediately about his conduct and made a complaint to his employer.
52. This risked real reputational damage to his employers as his van was easily identifiable as belonging to them. This was demonstrated by the fact he was immediately challenged by the employee of Red Distribution about his actions and an immediate complaint about his actions to the Respondent's Transport Manager.
53. Accordingly, the misconduct was sufficiently serious to justify summary dismissal and the decision to dismiss fell within the range of reasonable responses. The Claimant himself accepts his conduct amounted to misconduct, albeit that he minimises the seriousness of it, and submits that a lesser sanction than dismissal was appropriate.
54. The procedure followed by the Respondent was procedurally fair. They followed their own disciplinary policy. The Claimant accepted his conduct. The Claimant was informed of the disciplinary hearing in writing and given the right to be accompanied. He was provided with copies of the evidence obtained in the investigation. He was given the chance to view the CCTV footage. The disciplinary officer Mr Derrick was independent of the investigation. The Claimant was advised verbally and in writing of the outcome as well as his right to appeal, which he exercised.

55. The appeal hearing was rescheduled to accommodate his availability and he was able to present new medical evidence. The appeal officer Mr Russell was senior to Mr Derrick and under no undue influence from him. Mr Russell considered all the investigation material as well as the new medical evidence. For the reasons set out above, he was correct to discount the new medical diagnosis.
56. In following their own policy, the Respondent has met the ACAS Code of Practice for Disciplinary and Grievances.
57. For all these reasons the Claimant was fairly dismissed for misconduct, the decision to dismiss falling within the range of reasonable responses.

Employment Judge Millard
Date: 14 April 2023

Judgment & reasons sent to the Parties on 24 April 2023

For the Tribunal Office