EMPLOYMENT TRIBUNALS

Claimant: **Mr Michael Dyson**

Respondent: **London Borough of Redbridge**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **Wednesday 20 October 2021**

Before: **Employment Judge Britton**

Representation:

For the Claimant: **In Person**

For the Respondent: **Mr T Wilding (Counsel)**

JUDGMENT

This claim which is for unfair dismissal is dismissed.

REASONS

Introduction

1. On 18 May 2021 the Claimant presented his claim (ET1) to the Tribunal. It is for unfair dismissal pursuant to s95 and s98 of the Employment Rights Act 1996 (the ERA). He set out that he was employed by the Respondent between 1 January 2014 and 1 March 2021. Stopping there by its response (ET3) the Respondent gives a start date as the 8 December 2014 and the dismissal date , as being 5 March 2021. That dispute is resolved as it is self-evident that dismissal was on 3 March 2021 with immediate effect as to which see the dismissal letter of that date at Bp196[1].

[1] Bp= bundle page in the indexed bundle before me.

2. Going back to the ET1, in essence what the Claimant stated was "wrongfully dismissed over a parking ticket I got on a company vehicle... victimisation" treated differently compared to other employees." He also brought into the equation that there was a final written warning which had been issued to him relating to a Facebook posting he had made. He pleaded that the warning should not have been imposed as "that was my own personal Facebook in my personal time". I will deal with that in due course.

3. By its Grounds of Resistance to the ET3 the Respondent set out in in considerable detail the history of matters culminating in the dismissal.

4. Put simply the principal issue for me to decide is was the decision to dismiss the Claimant for neglect to deal with two parking tickets issued by the Newham London Borough Council and which led to the bailiffs descending upon the Ley Street Transport Depot of the Respondent on 12 November 2020 to distrain against the council's property because these tickets had been unpaid, a matter which therefore brought the Respondent into disrepute, a decision which was fair within the range of reasonable responses of an employer such as the respondent.

Law engaged and first observations

5. Section 98 sets out first of all the potential reasons that an employer can deploy for the purposes of a dismissal. One of those is misconduct. The burden of proof is upon the employer. I have no doubt whatsoever that the Respondent did believe that this was misconduct, and in that respect, I have heard the evidence of the Dismissing Officer; Mr Ola Akinfe.

6. The second issue therefore becomes, and where the burden of proof is actually neutral, as per S98(4). In other words, having regard to the reason, was the dismissal fair within the range of reasonable responses of a Respondent of the size and at administrative resources of this employer having regard to equity and the substantial merits of the case.

7. As Mr Wilding has pointed out, and indeed I started by saying the same when I opened this case today and set out what were the issues before me, the seminal authority in determining fairness in matters such as misconduct is *British Home Stores Limited v Birchall 1978 IRLR 379 EAT* **("Birchall")** and as modified in terms of the range of reasonable responses test subsequent thereto in such cases as *Sainsbury's Supermarket Limited v Hitt 2003 IRLR 23 CA*. Thus, what is essential and in terms of the fairness of the dismissal is that:

(i) First, there is undertaken an investigation and in which the Claimant has the opportunity to participate and with the right to be accompanied if he so wishes by for instance a Trade Union Official. That happened in this case from the onset when the Claimant was interviewed by the Investigating Officer on 30 November 2020, namely Mr Compton Gustave.

(ii) Second, there is a requirement, which brings in the ACAS Code of Practice but in fact it is mirrored in the Respondent's own disciplinary process, that he should be invited to a disciplinary hearing by letter which sets out the charge he has to face; that there is a potentiality that

he might be dismissed if the matter was found proven; and that he has been provided with the documentation to be relied upon; and of course the right to be represented by a colleague or a trade union official.. In all those respects the Respondent complied to the letter including that the Claimant was sent on 8 February 2021 the short investigatory report of Mr Gustave (Bp163 – 166).

(iii) The third requirement is that the disciplinary hearing should take place before somebody who has previously not been involved. This occurred in terms of Mr Akinfe assisted by Monique McKay of HR. Ms McKay had assisted Mr Gustave and provided HR continuity throughout, but she was not the decision maker at the disciplinary hearing. That was Mr Akinfe as he made plain before me.

8. At that disciplinary hearing the Claimant was again represented by the same Trade Union Official. There is no doubt that he was able to put his case as is clear from the minutes which can be found at Bp183 – 189. Mr Akinfe considered some additional documents that the Claimant put in before his decision was given to the Claimant on 3 March 2021. He dismissed him having concluded that what occurred constituted gross misconduct because it had brought the Respondent into disrepute. That particularly focuses on the visitation of the Bailiff. The letter sets out how Mr Akinfe considered the Claimant's mitigation but that it was outweighed by the gravity of the offence.

9. The Claimant submitted his detailed grounds of appeal on 18 March 2021. There was then an appeal hearing on 15 June 2021 before a panel of three councillors. The management case that the panel should uphold the appeal was submitted by Mr Akinfe who appeared as per procedure. The Claimant was able to fully present his case as is clear from the minutes which are at Bp208 – 209. The Claimant had the same Trade Union Representative. The decision of the Appeal Panel was to uphold Mr Akinfe's decision. What it means is that as to **Birchall** t the process followed cannot be faltered, and I have already touched upon that the Respondent clearly via Mr Akinfe genuinely believed that this was misconduct. I should point out that I found Mr Akinfe an honest witness who in no way was really undermined by the questioning of him by the Claimant or this Judge to assist Mr Dyson and in accordance with the overriding objective. So, this case becomes a matter of substance. Was the dismissal within the range of reasonable responses. I must not substitute my own view.

10. In reaching my decision, I have had regard to a substantial bundle of documents before me. It has been broken up into four sections which is somewhat unhelpful. In any event the core documentation of relevance is in part B, although some of part C has also been referred to. I have heard under affirmation, as I have with all witnesses because of the restrictions of CVP, first Mr Akinfe, Then the Claimant who has been cross-examined by Mr Wilding. I should have been hearing from Counsellor Elaine Norman from the panel at the appeal and whose statement is dated 16 August 2021. I am told she is unavailable. I have been given no reason as to why such as a sick note or a diarised engagement needing to take priority. Albeit her absence did not impact upon my decision I wish to remind her that as a Counsellor she has an elected role of responsibility, which includes in terms of the Respondent's appeals procedure being part of a presiding panel and which she obviously agreed to do. I do not find it acceptable for Counsellors, and I have seen it before as a Judge in similar circumstances, to think that somehow they are not expected to participate in a Tribunal proceeding such as this. I therefore wish it to be known that I

am displeased and that doubtless this will be reported back to the leader of the Council of the Respondent who I suggest should then enquire as to why Ms Norman took it upon herself to not appear today. It is a matter of public interest in that respect and in terms of the fulfilment of their responsibilities by elected representatives. I trust I make myself clear.

Findings of fact

11. I now come to the core evidence in this case, most of which is not in dispute. The Claimant was provided with a vehicle by the Respondent for the better performance of his duties as a Ground Maintenance Team Leader/Manager. Like the rest of his team, he was entitled to use that vehicle to travel to work and back from his home. He was not supposed to take it outside the Borough. More important, there was a practice, and I have to say I cannot see that it really needed to be in writing as it is so obvious and is in any event from this Judge's extensive experience that which applies in nearly all forms of employment that I have come across, that if that employee chose to park the vehicle in a restricted area other than in the most compelling of circumstances i.e. an emergency, then he or she would be responsible for any parking ticket that ensued. I was particularly persuaded by Mr Akinfe when I asked him a question which was "what would happen if an employee parked his van outside for instance a Sainsbury's on a double yellow line in the Redbridge locale for the purposes of going to buy a sandwich". Mr Akinfe not surprisingly said "he would be responsible for paying the parking ticket". But of course, as the Traffic Warden would enforce it against the registered keeper of the vehicle by way of its registration number, that parking ticket would of course first come to the Borough Council. Incidentally, it is known as a PCN. Then of course it would be passed through to the relevant Line Manager of the team in which the vehicle was used for him or her to identify the driver, and give him said PCN in order that he might pay it.

12. Well, the Claimant strayed outside the borough so to speak on two occasions for my purposes. I will accept, and because there is no evidence to contradict him and I found him an honest man, that the Claimant was at the time undergoing quite considerable and distressing personal circumstances. His relationship with his partner had broken down. She lived in Throckmorton Road in the Borough of Newham. He had gone back to live with his mother. However, he kept in contact with his estranged partner, and they had tried unsuccessfully on at least two occasions for a child. He got a first PCN on 3 May 2019. It is because he left the vehicle in a restricted parking area outside his partner's home in Throckmorton Road because she began to have a bleed, her being pregnant. He took her in her car to the local hospital. In his absence the traffic warden came along and slapped the ticket on. On the second occasion which was 18 July 2019, similar circumstances occurred, this time in fact sadly his estranged partner suffered a miscarriage. Sometime thereafter, although as to when it started is not clear, the Claimant may well have suffered from depression. There is no claim before me based upon disability discrimination pursuant to the Equality Act 2010. He also turned to gambling because of the breakdown in the relationship and the miscarriages. The gambling became an acute problem.

13. What then matters is as follows. As to PCN number one, the Newham Borough Council issued the appropriate parking ticket on 6 June 2019. It was received by the Respondent and passed immediately through to the Claimant's Line Manager, Ian Jardine. He was able to immediately identify that the culprit so to speak was the Claimant and he emailed him the ticket on the same day. Why? Well that is obvious, in order that

the Claimant could deal with it. Now, the Claimant says that at that stage under Newham's appeal procedure he sent in what I might describe as a mitigatory explanation along the lines I have now set out. He was unsuccessful but learnt of his right of further appeal to the Traffic Enforcement Commissions.

14. As to what he then did is muddled. All that matters is that Newham having not been paid sent what is known as a Ticket Charge Certificate to the Respondent on 5 September 2019. Again, it was passed immediately to Mr Jardine who immediately sent it to the Claimant by email. Bear in mind the Claimant at that stage was still working i.e. he was not under suspension and it is also to be noted that he did not say that he did not get these emails. Then on 23 March 2020 the Respondent got an Order for Recovery and emailed it through to the Claimant the same day. The Order is important because it means that at that stage the claim had not been successful in any appeal if he had made one. As the PCN has not been paid and the meter has been running so to speak, so the charges now has very much escalated, thus the matter is with the bailiffs. Unless it is now paid forthwith paid the bailiffs will come calling.

15. This was followed up by another Notice of Enforcement on 18 August 2020. Everyone of those documents as I have now said was immediately passed through to the Claimant.

16. Turning to PCN number two, the scenario is remarkably similar. Remaining unpaid it escalated in the same manner and indeed the final notices of enforcement on both PCNs were both on 18 August 2020 and immediately copied through to the Claimant by Mr Jardine. And, it gets worst, because I can gather that Newham Borough Council would only actually send the bailiffs as a policy as last resort, so it gives every opportunity to pay the debt first. So it sent a reminder on 12 October 2020 on both PCNs to the Respondent which was again passed through to the Claimant who did not pay, hence why the Respondent suffered the acute embarrassment of the bailiff coming to the Ley Street Transport Depot on 12 November 2020. In that respect, I have the statement of the relevant Senior Manager before me namely Josie Falco dated 25 November 2020 at Bp158. She ended up having to contact the enforcers at Newham and get a reduction from what was by now a demand for £960. She managed to get it down to £791.

17. The point is this, and I am with Mr Akinfe, Redbridge is a Traffic Enforcement Body. It employs Traffic Wardens. It issues PCNs just like Newham does and it enforces them in the same way. Therefore, it brings it into considerable disrepute if it becomes the subject of this kind of enforcement action because on the face of it, it could be seen to the outside world as tolerating non-payment of PCNs by its own workforce. That is clearly a serious implication in terms of reputational damage for a public authority such as the London Borough of Redbridge. Thus I have no doubt that Mr Akinfe genuinely believed and had grounds in that respect to support his belief that the Claimant's actions had brought the Respondent into disrepute and which as per the disciplinary policy misconduct.

18. There is one other factor I need to bring in. The Claimant also faced disciplinary action in relation to the posting on Facebook (B61) on 10 June 2020 of comments in relation to "Black Lives Matter". The contents of that posting speaks for itself. It had the potential to give offence. Second a reader thereof could identify the Claimant and that he was employed by Redbridge. Somebody did and made a complaint. The Claimant was suspended on full pay on 30 June 2020. That is before, of course, the bailiffs came calling on the PCN front on 18 August 2020. But it is after all the forwarding through to him by his

Line Manager of the notices for both PCNs. So, when the Claimant says that the suspension knocked him back so severely mentally that he could not address matters on the PCN front, it is actually water under the bridge because there were no requests for him to deal with the matter after 23 March 2020 until of course it was too late and the bailiffs came. So, the suspension explanation does not assist.

19. What could be said to assist is the Occupational Health Reports which are in the bundle. The first is dated 6 November 2020 (Bp136 – 137). The second is dated 2 March 2021 and is at Bp192 – 195. The first one refers to the Claimant by then suffering from anxiety and possibly depression. It observes that the Claimant has been suspended and the anxiety it is causing. It does not refer to anything else. The second having referred to the anxiety and depression elaborated on the reasons: -

(a) The four miscarriages to which I have referred and insufficient space mentally to grieve;

(b) Being in financial difficulties due to addiction through gambling; and

(c) Ongoing disciplinary process due to parking fine.

20. But the OH authors of reports said that the Claimant was fit to take part in any disciplinary process and that on the face of it the condition was short-term and ought to resolve itself with the outcome of the disciplinary process.

21. Why does it matter? Because part of the appeal grounds understandably championed by the Trade Union Rep is that the Respondent failed to take account of this mitigation and thus the dismissal was too harsh. I should make plain that the Claimant never denied at least some neglect in terms of the PCN issue and that it caused his employer at the very least embarrassment and indeed he was very remorseful and broke down in tears on one occasion.

22. In terms of his explanation for why he did not deal with these tickets. For reasons I have now gone to it cannot engage post suspension in June 2020. The only issue that might assist is his evidence that he did take steps to appeal to the Traffic Enforcement Commissioner? The TEC is based at Northampton County Court. To start the process a T7 Notice needs to be filed followed by a statutory declaration statement. What I can detect is that the Claimant on the face of what I have got may have put in the T7 Notice for one of the PCNs in December 2019 and just possibility the second in early March 2020. But there is no evidence that he ever put in the statutory declaration. If he did, he has not produced a copy before me; and he didn't in the internal proceedings. He infers that his appeal was not dealt with because of lockdown. But that cannot as such ride to the rescue as to December 2019 of course. And he produced nothing in the internal proceedings that might explain the position from the Northampton County Court. The problem he has got is as follows, stemming from his answers given in this hearing:-

(i) `There was actually no reason why he could not informed have Mr Jardine early on as soon as he realised that his appeal had been turned down at first instance, of the true reasons why he had incurred these PCNs and asking for help. As Mr Akinfe put it, there is every likelihood that Mr Jardine would have then been able to enlist the services of the Respondent's own Parking

Enforcement Team to assist in making representations to Newham. But the Claimant never approached Mr Jardine at all.

(ii) `Even if his mental health then deteriorated so that he became dilatory in dealing with matters, he was still able to hold down his job until his suspension.

23. That brings me back to the decision of Mr Akinfe. I have already said that he fairly concluded on sustainable grounds that that which occurred had brought the Respondent into disrepute. He did consider the Claimant's mitigation. In that respect, he did not have the second Occupational Health Report but then I cannot fault him in that respect because it was only written on 2 March and he was hearing this matter on 3 March and he issued his decision very swiftly thereafter. It may not even have got through to HR. But does it matter? That is because, if he had received that Occupational Health Report it would have only confirmed what the Claimant was telling him. Mr Akinfe did not actually disbelieve the Claimant when he talked about his personal circumstances. He weighed it in the balance but concluded that the seriousness of what occurred outweighed the mitigating circumstances.

24. Albeit until the Facebook issue the Claimant had a clean disciplinary record, in the circumstances his decision was not out with the range of reasonable responses. That I might have done differently is irrelevant. I must not substitute my own view. Therefore, the dismissal was fair.

25. That leaves me with the appeal. Insofar as there was a shortcoming in relation to HR not providing Mr Akinfe with that second Occupational Health Report assuming they had got it, the Claimant put it in to the appeal hearing as part of his documentation. He had put in his grounds of appeal those mitigating circumstances. . I have already stated that it is deeply regrettable that Counsellor Norman has not seen fit to appear before me, but there is no doubt from reading the minutes of the appeal hearing that the Claimant had every opportunity to put forward his mitigation, and he did, and the Panel had the Occupational Health Report; the Claimant's extensive documentation; and the Respondent management case including such as the investigation report and the disciplinary minutes. Having heard submissions it upheld the dismissal finding as per Mr Akinfe's that the seriousness of what occurred outweighed the mitigation. Although Mr Akinfe had alluded to having taking into account the final written warning on the Facebook front, he made absolutely clear at the appeals hearing that he had not considered it at all and he told me the same, and it does not appear in his disciplinary hearing minutes and is no part of his presentation to the appeal hearing. I believe him. It follows that the Facebook issue becomes irrelevant.

26. Given my findings so far, it follows that the appeal process does not undermine the fairness of the dismissal by Mr Akinfe.

Conclusion

27. The dismissal was fair and thus the claim is dismissed.

Employment Judge Britton
Dated: 6 December 2021