



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Steven Harry

**Respondent:** London United Busways Limited

**Heard at:** Watford Employment Tribunal (By CVP)  
**On:** 7 & 8 January 2021

**Before:** Employment Judge Cowen

## Representation

**Claimant:** Mr Harry In person

**Respondent:** Mr Nuttman Solicitor

# RESERVED JUDGMENT

- 1 The Claimant was unfairly dismissed by the Respondent.
- 2 The Claimant's application for reinstatement is dismissed.
- 3 The Respondent shall pay to the Claimant compensation for unfair dismissal made up as follows:
  - i. A basic award of £9,906
  - ii. A compensatory award of £20,368
- 4 The recoupment provisions do not apply.

## Introduction

1. The claim was issued by the Claimant on 17 February 2019 for unfair dismissal and arrears of pay. The response denied the claims and asserted gross misconduct. The arrears of pay claim was not defined by the Claimant during the hearing and is considered to be a claim for notice pay.
2. The hearing was heard by CVP online video hearing over two days. I received a joint bundle of documents, witness statements from the Claimant and Mr Southgate and Mr Evans on behalf of the Respondent. I also received a written skeleton argument from the Respondent's solicitor to support his closing submissions. I heard oral evidence from all three witnesses.

## The Facts

3. The Claimant was employed by the Respondent from October 2009 after a TUPE transfer from a predecessor. He worked as Operations Manager at the Park Royal bus garage and had many years of experience in the public

transport industry, since 1976. The Claimant reported to Mr Clapson, the General Manager.

4. The duties of an Operations Manager included responsibility for all day to day operations of the service including the bus drivers and controllers. The Claimant's job description included " Ensuring an understanding of and compliance with, Company procedures for health and safety, specifically reporting any accidents or defective equipment".
5. On Tuesday 16 October 2018 the Claimant was informed that a bus had been reported to the engineers with a bald tyre and he was shown a photo of the tyre. The Claimant went to the engineering manager's ( Mr Francis) office to discuss the issue with him. It was clear to the Claimant that Mr Francis had not yet engaged with this issue, so the Claimant inspected the tyre himself and asked Mr Francis to provide him with the engineering documents relating to the vehicle. The Claimant was shocked at the state of the tyre, on which the threads could be seen. He asked Mr Francis to also have the steering checked on the bus to consider whether a problem with the tracking may have led to the wear on the tyre in this way.
6. The Claimant's initial view was that he believed the tyre to be defective. However, he also called for the Vehicle Defect Cards, which showed the inspection by the drivers before they took the vehicle on shift (referred to as a 'first use check'). This is a legal requirement of all bus drivers. The Claimant noted that in the 7 days prior to the defect being identified the bus had been driven by experienced drivers whom the Claimant trusted to have carried out their first use checks competently. Nevertheless, he requested the CCTV from the previous 7 days in order to ensure that a proper inspection of the bus had been carried out each day before it left the garage. He believed this would eliminate the drivers from the investigation as to how a defective tyre had been allowed to remain on the bus undetected.
7. The Claimant also started to draft an email to Mr Clapson, his line manager to inform him about this incident. He wanted to include reference to the investigation of the tracking on the bus, so returned to Mr Francis for an update. Mr Francis informed him that the tracking was indeed very wrong. This reinforced the Claimant's view that this was a one-off incident due to an error on this vehicle. Unfortunately, when he returned to his office, the Claimant forgot to update and send the email to Mr Clapson.
8. The following day the Claimant returned to work and carried out the usual first use check audit, not as a result of the incident the previous day, but as part of a routine audit. He looked at four drivers and discovered that two of them had not completed the first use check properly. He took steps to remind them of how to carry out the check properly.
9. Also on 17 October, Mr Clapson came to the garage. The Claimant met with him and discussed other operational issues. The Claimant did not raise the issue of the defective tyre or the investigation with Mr Clapson.
10. On 19 October the Claimant had a day off work. He was contacted by Mr Clapson who asked what he knew about the defective tyre. The Claimant explained that he had requested the CCTV and that a possible fault with the tyre was being investigated.

11. After the weekend, when the Claimant was at work on Monday 22 October, Mr Clapson attended and asked to interview the Claimant about the tyre incident. The Claimant handed Mr Clapson the notes he had compiled thus far about the incident. When they met, the Claimant was told it was a formal interview and at the end of the conversation he was suspended.
12. Mr Clapson then instigated a check on the tyres of the whole fleet of buses. The Claimant was told that five buses were found to have defective tyres. He was not shown evidence of this, nor was it presented at his disciplinary hearing or appeal.
13. On 26 October the Claimant was invited to a disciplinary hearing on 1 November at the Edgware Garage which was conducted by Mr Southgate. The charge was one of failing to complete his duties as an Operations Manager in relation to the discovery of a defective tyre; by not communicating the issue and by inaction in allowing vehicles to be driven without proper first use checks for possible serious defects.
14. The letter inviting the Claimant to the disciplinary hearing did not enclose copies of the documents relied upon. The Claimant requested copies and was sent them by email, but was unable to open this. He was given 20 minutes at the start of the disciplinary hearing to review the documents.
15. At the start of the disciplinary hearing the Claimant wanted to read a statement, he was stopped from doing so by Mr Southgate who told the Claimant that he would follow the procedure for hearings. The Claimant was not given a further opportunity to make his statement in full, but was able to refer to it throughout the hearing, as he answered the points.
16. Mr Southgate concluded that this was a very serious offence and that there had been a lack of investigation by the Claimant, as well as a failure to inform Mr Clapson. The letter of dismissal outlined that the Claimant had carried out an investigation that involved detailed analysis of log cards and duty cards against the 24 hour sheets. It also stated that the Claimant had carried out his usual run out checks on Tuesday and requested CCTV footage as well as a report from the driver involved. However it went on to say that Mr Southgate believed that the Claimant should have carried out a 'full investigation'. This was not defined in any way in the letter. It became clear in the oral evidence that a full review of all the buses in the depot, together with checks on the relevant drivers was expected. The dismissal letter acknowledged that the Claimant had spent a whole day matching the drivers to their sheets, it described his carrying out four first driver checks as 'a disappointing response'. It also acknowledged that requesting the CCTV was the correct response but said that he had done little whilst waiting for the CCTV to become available.
17. Mr Southgate outlined that the Claimant had failed to call Mr Clapson and provided no evidence of the email he said he had drafted. He believed that the Claimant had given no urgency or thought to the possible outcome of the investigation, showing a lack of understanding of the gravity of the situation. Nor had he checked the vehicle immediately. He also thought that the check which the Claimant carried out with regard to the drivers was inadequate and

should have led to an escalation in the situation. Mr Southgate concluded that the failure to instigate a fleet check was irresponsible.

18. Mr Southgate concluded that the appropriate action was a matter which warranted summary dismissal. The letter does not outline what was taken into account in deciding the penalty other than “ all the information presented today, your length of service”. In evidence he stated that he felt that the issue was one of trust and that he could no longer trust the Claimant to carry out such a role.
19. Mr Southgate acknowledged that of the four drivers who took out the bus in the days leading to the incident, only two were disciplined and they had not been dismissed.
20. The Claimant appealed his dismissal. The grounds of appeal which were considered were disputed evidence and breach of procedure. The Claimant set out in his appeal letter the points he wished to raise.
21. On 28 November, the Claimant’s appeal was heard by Mr Evans and Mr Sweet. They heard evidence from Mr Francis and the Claimant answered questions. He highlighted a number of problems at the garage which he was dealing with, together with his personal mitigation. He admitted that he had made a mistake with regard to this incident, Mr Evans and Mr Sweet adjourned to consider the evidence and reconvened on 3 December 2018, where they told the Claimant that they were upholding his dismissal.

### **The Law**

22. The Tribunal must consider whether the dismissal was unfair. In doing so they consider the following issues in accordance with s.98 Employment Rights Act 1996 and BHS v Burchell [1978] ICR 303;
  - a. What was the principal reason for the dismissal and was it a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996? The respondent asserts that it was a reason relating to the claimant’s conduct.
  - b. Was the dismissal fair in all the circumstances in accordance with equity and the substantial merits of the case (and section 94 of the Employment Rights Act 1996)?
  - c. Did the respondent have a genuine belief in the misconduct which was the reason for dismissal?
  - d. Did the respondent hold that belief in the claimant’s misconduct on reasonable grounds?
  - e. Did the respondent carry out a reasonable investigation in all the circumstances?
  - f. It is also contended by the claimant that an unfair procedure was followed,
23. In accordance with Iceland Frozen Food v Jones [1982] IRLR 439 whether the decision to dismiss was a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer.
24. It is not necessary to consider whether the appeal was a review or a rehearing as Taylor v OCS Group Limited [2006] IRLR 613, CA indicated

that what is important is that the procedure was fair overall. It also sets out that an appeal can correct any defect in the initial investigation or procedure.

25. If the dismissal was unfair, the Tribunal must consider whether the claimant caused or contributed to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?
26. The Tribunal should also consider if the dismissal was procedurally unfair, whether an adjustment should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed? *Polkey v AE Dayton Services* [1987] UKHL 8.

### **The Decision**

27. The Claimant was dismissed for an issue of conduct – namely the failure to inform his manager of the incident and a failure to carry out an investigation in the manner which management required. This is a potentially fair reason for dismissal.
28. I conclude that Mr Southgate did have a genuine belief in part of the reason for the Claimant's dismissal. His belief was that the Claimant had not informed Mr Clapson of the incident. As the Claimant's line manager, it was appropriate for him to be informed and the Claimant acknowledged this. Mr Southgate also believed that the Claimant should have acted differently in the way in which he handled the situation. Namely by acting more quickly to ensure that the drivers and all the other vehicles were checked to establish that there were no other defective tyres being taken out on the road.
29. The letter of dismissal outlined the belief of Mr Southgate that the Claimant had failed to carry out a "full investigation", but did not specify what that should have involved. The Claimant's witness statement made reference to an ulterior motive by Mr Clapson with regard to the Claimant's dismissal, but there was no evidence to support the theory that this had influenced Mr Southgate in any way.
30. The issue of whether Mr Southgate had reasonable grounds for his belief is the more finely balanced aspect of this case. Mr Southgate based his decision on the investigation carried out by Mr Clapson, the evidence of which showed that the Claimant had taken steps to identify the nature of the problem and whether the issue could and should have been discovered at an earlier point (i.e. by drivers not doing their first use checks properly).
31. However, Mr Clapson's investigation appears to have gone on to consider whether the Claimant had taken sufficient steps bearing in mind he found that two of the four drivers he saw the next day did not carry out their first use checks appropriately. This was a point which Mr Clapson and Mr Southgate relied upon, but was not a direct result of the incident, but rather a routine check. The Claimant's lack of response to this finding was criticised by both Mr Clapson and Mr Southgate. But this was not a matter which was the subject of the allegations in the disciplinary letter inviting the Claimant to the meeting.

32. There was no evidence produced to the Tribunal to indicate that the Claimant had been trained, or told by way of a policy or procedure, how to investigate this particular type of incident. He was trusted by the Respondent to carry out the investigation as he saw fit and using his expertise and his experience. The Respondent has asserted that the investigation carried out by the Claimant was insufficient and did not give the incident the appropriate level of severity, but has not shown that the Claimant had been trained or informed of an expected standard.
33. The Claimant did start an investigation. He followed what his experience told him was a reasonable line of enquiry – i.e that the tyre and/or bus were defective. He therefore ensured that steps were taken to identify whether this was correct.
34. The Claimant also called for the CCTV in order to check whether the information given to him; that the drivers had carried out their first use checks, was reliable.
35. Mr Southgate therefore based his decision on his disapproval of the Claimant's handling of the situation. The Claimant had not been trained to handle the situation in any specific manner. The basis for the decision was therefore Mr Southgate's subjective view and not the objective evidence of what had happened.
36. Mr Southgate believed that the Claimant had failed to react to this situation with the appropriate level of severity and had missed opportunities to report it to Mr Clapson. In doing so he believed that he had allowed other potentially dangerous situations to persist unnoticed. The subsequent investigation by Mr Clapson had uncovered another five buses with defective tyres. However, these were not part of the allegation with respect to the Claimant.
37. Mr Southgate's belief that the Claimant failed to tell his manager was based on the evidence. His belief that the Claimant had by his inaction allowed the vehicle to be driven on the public highway without proper first use checks with possible serious defects was based on the subsequent inspection which showed that other buses also had defects. However, it was not a requirement in such a situation that the Claimant carry out the checks on other buses and the Claimant believed that the problem was specific to this bus. It was Mr Clapson and Mr Southgate's preference that he should have widened the investigation. That decision was not therefore a reasonable belief as it was based upon a subjective, personal opinion of Mr Southgate.
38. The process applied by the Respondent in this situation was adequate in that the Claimant was interviewed, invited to a hearing, told of the allegation against him and the possible consequences and offered the opportunity to be accompanied. Unfortunately he was not show the documents in advance of the hearing, but some time was given to allow this error to be rectified. The Respondent did not allow the Claimant to read out his prepared statement during the disciplinary hearing. However, the Claimant did not make an issue of this and was allowed to refer to it during the course of the meeting and hence it would appear that no disadvantage or unfairness occurred.

39. Having decided that the Claimant was to blame for his conduct, Mr Southgate went on to decide that this amounted to a gross misconduct. I must consider whether the decision to dismiss was within the band of reasonable responses. Mr Southgate was aware of the Claimant's previous record with the company, his long service and his personal circumstances. He was also aware that the Claimant had taken some steps to investigate the incident. He also knew that no harm had occurred as a result of this incident, nor had the company had any penalty from the licensing authority. Mr Southgate's evidence showed that he disapproved of the Claimant's stance of defending himself and indicating he would appeal. I am of the view that it was this point which influenced Mr Southgate to conclude that the Claimant should be summarily dismissed and not as he suggested, the fundamental nature of his breach.
40. The Claimant appealed his dismissal which was an opportunity to rectify any mistake which had been made by Mr Southgate.
41. Mr Evans' evidence of the appeal indicated that he did not consider the Claimant's actions to be sufficient, he described that "it looked like no actions had been taken". This is clearly inaccurate and shows a failure to take account of the evidence which was before him.
42. Mr Evans' also said that he asked the Claimant at the appeal if the drivers had been trained and he said that they had. On asking more detailed questions, it became apparent that the Claimant admitted that had not kept up to date records of the training of the drivers. Mr Evans felt that this provided the Claimant with a motive for not carrying out a full investigation of the tyre incident and led to his lack of trust in the Claimant.
43. The Claimant raised the issue of the discrepancy with regard to how he had been treated in comparison to the drivers whom Mr Southgate and Mr Evans both considered culpable. Whilst it is noted that they were not dismissed for their actions, this cannot be directly comparable to the dismissal of the Claimant, as his responsibilities were not the same.
44. The appeal outcome statement in the bundle referred to the disciplinary procedure example of gross misconduct as "Failure to observe the Company's rules/procedures or reasonable instructions relating to employment, including those affecting health and safety of staff or the public". The Respondent has not shown any company rule, procedure or instruction given to the Claimant on how to handle or investigate an issue of a defective tyre. Mr Evans refers in the summary to "you are responsible for the health and safety of your staff and their passengers, By this I mean ensuring that complete and competent first use checks are carried out on our buses before they enter service". This indicates that Mr Evans was considering a different and wider issue than how the Claimant investigated the incident on the 16 October 2019.
45. The evidence also shows that the Claimant expressed remorse at the appeal by saying he "made a poor judgement call" and also raised issues of mitigation in terms of his workload; points which Mr Evans asserted that he took into account, but which are not reflected in his decision that the Claimant could not be trusted to act appropriately in the future.

46. The personal views of the appeal officer appear to have been relied upon in making a decision as to whether the Claimant's actions were within the terms of his job description. It is my view that Mr Evans took into account issues and evidence beyond that which was the focus of the initial reason that the Claimant was suspended and investigated. He also took into account evidence about the Claimant's record keeping in relation to first use checks which the Claimant had not had time or reasonable opportunity to refute.
47. The appeal therefore did not rectify any of the mistakes of the disciplinary hearing, but compounded them, by upholding the dismissal for reasons which were not related to the allegation and for not taking into account evidence which was relevant. The Respondent imposed standards on the Claimant in the disciplinary hearing which had not been set out to him in training, policies or procedures. It was therefore not within a band of reasonable responses to dismiss him for failing to achieve such standards.
48. I conclude that the Claimant was unfairly dismissed for the reasons outlined above.
49. The issue of whether, had a fair process been followed, the Claimant would have been dismissed by this Respondent in any event, must be considered. Had the Respondent limited the investigation to consideration of what the Claimant did do and what had the Claimant been instructed and/or trained to do, then it is still possible that the Respondent would have dismissed the Claimant. This is because, the investigation uncovered other issues with the Claimant's work which did not meet the standards required of him. Had those been brought to the disciplinary hearing in an appropriate and fair manner, then it is possible that the Respondent would have dismissed for those reasons. I find that there is a 50% chance that this would have occurred.
50. I am also asked to consider the issue of contributory fault. That is whether the actions of the Claimant prior to his dismissal contributed to that outcome. I do not consider that they did. The Claimant instigated an investigation which he believed would reveal the reason for the defective tyre. Both Mr Southgate and Mr Evans refer to a number of steps which he took. The criticism levelled at him by his superiors is that he did not act quickly enough and raise the issue to a level of seriousness which they deemed appropriate. That does not mean that the Claimant did nothing, he clearly did start an investigation. He was not able to continue or complete it due to his suspension.

### **Remedy**

51. I am asked to consider the issue of reinstatement. Whilst I appreciate that the Claimant wishes to return to the industry which has been the source of his career and the job which he carried out successfully for many years, it would appear that the relationship with his superiors has been broken beyond repair.
52. I have taken into account the fact that his superiors have indicated that regardless of the evidence of the specific situation they were prepared to say that they no longer had trust in the Claimant with regard to the health and safety aspects of his job. It is therefore unlikely that a return to the same garage would be possible. I also take into account the fact that this dismissal took place some time ago (in October 2018) and that all parties have had



time to reflect on their positions since then. I therefore consider that compensation would be a more appropriate recompense in this case.

53. The Claimant's claim for basic award is calculated as £9,906. The Claimant was out of work for 25 weeks. His gross earnings per annum, including car allowance were £50,829. This is a loss of £730 net per week including pension contribution. He therefore lost £9,125 (after the Polkey deduction), which shall be repaid by the Respondent.
54. After starting new employment the Claimant lost £422 net per week (including car allowance and pension). The Tribunal awards 12 months for the Claimant to recover to the income he previously achieved, less a deduction for the Polkey award. A loss of £10,972.
55. The Claimant is awarded £450 for loss of statutory rights due to his long service for the Respondent, however this is also subject to the 50% reduction.
56. The Respondent shall pay the Claimant a total award of £30,228. A grossing up of £228 results in a further £46. Thus a total award of £30,274 will be made.

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Employment Judge Cowen

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Date 24 February 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
24 March 2021

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FOR EMPLOYMENT TRIBUNALS