



RM

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Smith  
**Respondent:** First Essex Buses Limited  
**Heard at:** East London Hearing Centre  
**On:** 21 February 2020  
**Before:** Employment Judge McLaren

## Representation

**Claimant:** Ms C Hunt (Counsel)  
**Respondent:** Mr A Hutchinson (Solicitor)

# RESERVED JUDGMENT

The decision of the Tribunal is that:

1. The claimant was dismissed for a fair reason, namely conduct.
2. The claim for unfair dismissal does not succeed.
3. The claim for wrongful dismissal does not succeed.

# REASONS

## Background

1 The respondent operates passenger carrying vehicles in the Essex area. The claimant was employed as a mechanic from March 2005 until 11 May 2019 when he was dismissed for gross misconduct. By a claim form presented on 17 September 2019 he brings a claim for unfair and wrongful dismissal.

2 The dismissal related to the claimant's failure to use a steering wheel cover while working on a vehicle. It is the respondent's position that the Safe Operating Policy("SOP") required a steering wheel cover to be used in all circumstances.

3 The claimant states that the policy did not cover situations where the steering wheel was removed and that in dismissing, the respondent misapplied its own policy and failed to follow a fair process.

Issues

4 At the outset of the hearing the parties agreed the following list of issues that I should determine.

*Unfair dismissal*

5 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)? The respondent asserts that it was for gross misconduct.

6 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called ‘band of reasonable responses’?

7 The claimant contends that the respondent did not adopt a fair procedure when dismissing him, but it misapplied its own policy, and did not hold a genuine belief that the claimant was guilty of the alleged misconduct. The claimant further contends that dismissal was outside the range of reasonable responses and the respondent had not formed a reasonable belief that the claimant had committed an act of gross misconduct.

8 The claimant contends that the respondent failed to follow a fair procedure and did not conduct a full and proper investigation that was appropriate all the circumstances. In particular the respondent did not inform the claimant of the allegation against him. The claimant was not afforded the opportunity to state his case and the respondent did not provide an explanation for its decision. The respondent failed to provide adequate witness testimony and/or obtained that testimony in an improper manner. Mr Gilmore was not a neutral appeal chair. The decision-makers did not make or maintain a note of the reasons behind their decisions.

*Remedy for unfair dismissal*

9 If the claimant was unfairly dismissed and the remedy is compensation:

- (a) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed.
- (b) would it be just and equitable to reduce the amount of the claimant’s basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
- (c) did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

*Wrongful dismissal*

- (d) Did the claimant's conduct amount to a fundamental breach of the contract of employment?

Evidence

10 I heard evidence today from the claimant on his own behalf and from three witnesses for the respondent. Mr Lewis, Engineering manager, who heard the disciplinary hearing, Mr Gilmore, Fleet Engineer, who heard the first level of appeal and Mr Wickers, Managing Director, who heard the second appeal.

11 I was provided with a bundle of documents amounting to 118 pages. In reaching my decision I considered the evidence before me together with those pages of the bundle to which I was directed. I was also assisted by helpful submissions from both parties.

Finding of facts

Contractual documents and Disciplinary Policy

12 The claimant's employment contract expressly states it was a condition of employment that staff work safely. Staff must comply with all company procedures and practices relating to health and safety matters. The contract stated that any failure to do so could result in disciplinary action being taken, which in serious cases could include dismissal without notice.

13 The company's disciplinary policy, which was agreed with the union, set out the steps that would be taken in the event of any potential conduct issues. It specified that summary dismissal could occur when misconduct is serious enough to break the contract between the respondent and the employee. The policy contained examples of gross misconduct which could warrant summary dismissal. This included "serious failure to observe safety rules and policies which affect yourself, other employees or members of the public".

14 The policy contained template letters to be used for the various stages of the process and these were used in this case to convene the meetings and to provide the outcome. The outcome letter does not specify that details of how the decision has been reached are required. It requires the notes of the meeting to be attached. In this process management followed the template.

15 The claimant was suspended before the investigation started. The disciplinary policy permits this and again provides a template letter. This was not issued to the claimant.

SOP

16 The bundle contained some health and safety briefings. The respondent issued a toolbox talks manual in February 2011 specifying that steering wheel covers must be placed securely over the steering wheel at all times while work is taking place. This followed a sad incident in 2002 when an engineer was killed when a bus drove over to him.

17 This document did cover a situation where the steering wheel cover was not to be used. That was when the employee had finished working on the vehicle but it was still not cleared for service. In those cases a “not for service” sticker was to be placed on the vehicle windscreen.

18 The policy was reiterated again in a letter to all staff on 29 July 2016 which stated that use of a steering wheel cover is mandatory for all tasks of maintenance, inspection, servicing, repair and cleaning of vehicles. The letter went on to say that this important safety message was not being fully adhered to there. All are reminded that the use of steering wheel covers when undertaking the functions set out above is mandatory. It reminded staff that failure to use steering wheel covers would be considered a dangerous breach of safe working and would be treated as gross misconduct.

19 On 16 August 2017 the claimant signed to confirm attendance at a Toolbox talk on steering wheel covers. That confirmed that use of steering wheel covers is mandatory. The Toolbox talk document (at page 63) states again that before work started on any vehicle a steering wheel cover must be placed over the steering wheel. It specified that the only situation in which this was not required was when a driver was carrying out a first use check. All other work on the bus required a steering wheel cover to be put in place.

20 The claimant was fully aware of the need to use steering wheel covers and had received regular training in relation to health and safety including the steering wheel covers. He was Unite the union's safety representative at the respondent's Basildon depot. He was aware of the policy and the disciplinary consequences of not following it and had received sufficient training on this.

21 I find that the respondent, as the operator of a regulated service did, and was entitled to, take health and safety extremely seriously and it had in place clear policies which were well communicated to staff.

22 I accept the evidence of Mr Lewis, which was not disputed, that a bus can be switched on without a steering wheel in place. While the tragic accident that occurred in 2002 had involved a bus moving forward, catastrophic injury could still occur if an engine was switched on while the bus was being worked on from the back or underneath. The steering wheel cover is there not just to prevent the bus moving, but also to prevent the engine being switched on.

#### Events prior to the 11 April 2019

23 On 22<sup>nd</sup> March 2019 the claimant was invited to attend an investigative interview to discuss an allegation that he had been working on a vehicle without a steering wheel cover. On 27<sup>th</sup> March the claimant attended this meeting accompanied by his trade union representative. He admitted he was aware of the policy with regard to the use of steering wheel covers and he was provided with a file note that stated that repeating similar misconduct is likely to lead to formal disciplinary action next time. This was not part of a formal disciplinary process.

24 The summary of the meeting, the way in which the claimant needed to improve his conduct, that is to ensure he put a steering wheel cover on a vehicle while he was working on it, and the consequences of any future failure to do so was set out in a letter of 2<sup>nd</sup> April. This was a matter of days before the incident

for which he was then dismissed. The claimant was clearly aware of what he was required to do and the consequences of failing to do so.

Investigation into events on 11<sup>th</sup> April 2019

25 On that day the claimant was working on a bus. He was seen not to be using a steering wheel cover. He was suspended by Graham Hill, Engineering Supervisor, pending a full investigation into this.

26 The claimant was not sent a letter of suspension in breach of the respondent's policy. He clearly understood that he was suspended as he did not attend for work. His colleague, Paul Barry, in a statement later provided as part of disciplinary process confirmed that about 10 minutes after tests had been run, Mr Hill told the claimant to leave the premises and he was told that he was suspended because it did not have a steering wheel cover on. I find that the claimant was told the reasons for the suspension. He did not raise any questions about the lack of a letter at the time.

27 The claimant was sent a letter dated 15 April 2015 (page 78 the bundle) inviting him to attend a formal disciplinary hearing meeting. This letter explained that the author, Mr Hartman, the Depot Operations Manager, had been appointed as investigating officer. The letter made it clear that the claimant could be accompanied by his trade union representative and that once the full investigation had been concluded a decision would be made as to whether a hearing would take place. The letter also made it clear that a possible outcome could be termination of employment.

28 The letter specified that the meeting was regarding the allegation that the claimant was working on a vehicle without a steering wheel cover. This is the same allegation as was put him verbally at the point of suspension.

29 In advance of this meeting Mr Hartman had taken statements from two individuals. In his statement Graham Hill, the engineering supervisor confirmed that he had spoken to the claimant that morning when he was working on the bus. The claimant wasn't wearing goggles and was asked to put them on. Mr Hill also noticed that no steering wheel cover was on the bus and he asked the claimant to put a cover on the steering wheel. He rechecked 10 minutes later and noticed that the steering wheel had then been removed. Mr Hill noted that he spoke to the claimant about this who explained that he had removed the steering wheel and the cover from the bus because he was working on the air system and he could not see the air gauges.

30 Mr Hill reported this to Mr Smith who was concerned about this and took advice from senior management. Mr Hill reported that he then had a conversation with Mr Parry on the telephone and that he was instructed to suspend the claimant pending a full investigation into the breach of health and safety.

31 Mr Smith, in his statement, confirmed that he had a conversation with Graham Hill at around 10 o'clock who told him that he had spoken to the claimant about not wearing goggles and there being no steering wheel cover. Mr Smith asked Mr Hill if the claimant had complied with the instruction he had been given and was told by Mr Hill that the claimant had taken the steering wheel off because he could not see the gauges while he was working on the air system. Mr Smith did not believe that was an acceptable reason and therefore raised the issue with senior management.

32 Mr Smith also stated that walking back to his office he could see that the bus was lifted, the steering wheel was removed with a steering wheel cover on the front dashboard and the claimant was working at the rear of the vehicle at that time.

33 The statements, while they had been prepared, were not provided to the claimant in advance of the meeting on 18 April. The notes of the meeting show that it opens with Mr Hartman asking if the claimant understands why he was suspended and what the allegation was. Mr Hallet, the trade union representative, states that they don't know yet and are unaware of the allegation. The meeting was adjourned while the claimant's representative was given copies of the statements of Mr Smith and Mr Hill. At the resumed meeting they were asked if they understand the purpose of the meeting and it was agreed that the allegation was about working without a steering wheel cover. This is the allegation that was set out in the invitation letter. I found that while the respondent did not send a suspension letter in accordance with this practice, the claimant was aware of the reasons for this and was aware of the purpose of the meeting.

34 The claimant confirmed that he was working without a steering wheel and so didn't need a cover. He had removed the wheel to check the gauges and to create enough space for himself to lean out of the cab window and speak to the colleague he was working with. By his account Mr Hill had accepted that the claimant had a good reason for not having the cover on i.e there was no wheel, and it was only when he came back some 10 minutes later that he had an issue with it.

35 The claimant explained that he had carried out a risk assessment in his head and concluded that he could work safely as he was in the cab and nobody was going to enter. Taking the wheel off was the appropriate action and a steering wheel cover was therefore unnecessary because who would start the bus with no steering wheel? Further, the bus was suspended in the air and the claimant was in the cab.

36 As part of the investigation the claimant was shown a number of photographs. Those at page 69 and 70 show the interior of a cab. That at page 70 shows that the gauges are still visible with the steering wheel cover on. The claimant responded to this by explaining that he had been working on the dash and did not have it in place. The picture was therefore not relevant.

37 The investigative meeting was adjourned for Mr Hartman to carry out further investigations. Mr Hartman took an additional statement from Mr Hill. He confirmed that he had told the claimant to use the steering wheel cover but instead the claimant had removed the steering wheel. He had not been instructed to do so and had no reason to remove the steering wheel cover or the steering wheel itself for this job. At the time the claimant was working on his own and he was underneath the bus at the rear wheel. He did not accept the claimant's explanation that cab gauges need to be visible to do the job because external test gauges were being used. Mr Hill's additional statement confirmed that he suspended the claimant at approximately 10:30.

38 The investigative meeting with the claimant was reconvened on 29 April. At this meeting Mr Hartman put his conclusions to the claimant. These were that having interviewed him again, Mr Hill had not said that it was a good enough

excuse not to have a cover on because there was no steering wheel, that the claimant was not working with a colleague at the time and that it was not necessary to remove the wheel to carry out this job. Mr Hartman therefore concluded that the matter would proceed to a formal disciplinary meeting. He did not provide the claimant with a copy of the additional statement in advance of this reconvened meeting. He did not take a statement from Mr Parry as he accepted Mr Hill's evidence that the claimant was working alone at the relevant time.

The disciplinary meeting.

39 Ian Lewis was appointed chair of the disciplinary meeting. Having been asked to conduct the disciplinary hearing he was provided with the photographs taken by Mr Hartman, the meeting notes, the invite letters, the safety policies and the company's disciplinary procedure.

40 Mr Lewis reviewed these papers and considered that he needed to obtain some further statements. James Parry, Engineering Manager, was interviewed. He confirmed that he received a phone call from Graham Hill stating he had observed the claimant was working on a bus without a steering wheel cover in place. He was told no one else was working on the bus. He instructed Mr Hill to suspend the claimant from duty.

41 Paul Barry was interviewed. His statement at page 89 confirmed that he had been working with the claimant. He confirmed that no steering wheel cover had been in place because there was no steering wheel. He supported the claimant's account that its removal was necessary for the work that was being undertaken.

42 Mr Lewis then met with the claimant on 18 May. In advance this meeting the claimant was provided with the documents that had been missing at the disciplinary investigation. The claimant therefore had all relevant documents prior to this meeting. Any failure by the investigator was therefore corrected.

43 He was accompanied by union representative. Notes of the disciplinary hearing were taken and were included in the bundle. At the outset of the meeting Mr Hallett asked for the email that was referred to in the statements of Mr Parry and Mr Smith. Mr Lewis adjourned the meeting to locate this email which was provided.

44 This email was sent by Mr Smith to 3 people including Mr Gilmore who was later involved in the subsequent disciplinary process. It stated that Graham Hill, engineering supervisor, had cause to speak with the claimant that morning in regards to the use of personal protective equipment. He had noticed that the steering wheel cover was missing. The claimant had removed the steering wheel but the job he was undertaking was not steering related. Mr Smith asked for thoughts on this. None of the recipients replied to the email.

45 Mr Lewis, as the notes show, went through the events of the morning of 11 April with the claimant. There was a contradiction between the claimant's account and Mr Hill's evidence. The claimant said that he had taken the steering wheel off before he went to an external supplier and that the wheel had been off on the first occasion Mr Hill had spoken to him. On the claimant's account the wheel had been removed before 9 o'clock. Mr Hill's account was that the wheel was in place on the first occasion he had spoken to the claimant but had been removed when he went back to check that his instructions had been observed.

46 Mr Lewis was asked to clarify the position again with Mr Hill and he adjourned the meeting to do so. In that adjournment Mr Lewis's evidence was that he spoke to Graham Hill who confirmed to him that he was 100% sure that the wheel had not been removed on the first occasion. Mr Lewis did not take a note this conversation but simply reported it to the claimant at the reconvened meeting. The claimant was not therefore given a written statement by Mr Hill but did have an opportunity to challenge what he was told Mr Hill had said. As the information was limited to the same point in dispute, had the steering wheel been on during the first conversation or not, seeing a second statement in writing which confirmed the first would not have assisted the claimant. He was not prejudiced by not getting this in writing as he did have an opportunity to respond.

47 The meeting was adjourned a second time as Mr Lewis was asked to speak to Paul Barry about when he was and wasn't present. Mr Lewis again had a conversation with Mr Barry which he did not note but reported to the claimant. Mr Lewis said that Paul Barry had confirmed the only conversation he was party to was when Mr Hill suspended the claimant and that he was not present at the time when the conversation with Mr Hill about the steering wheel took place. Again, while the claimant was not provided with this in writing he was told the salient points and had an opportunity to respond. He was not prejudiced by this failure.

48 Mr Lewis adjourned for half an hour to consider the position and concluded that there had been a failing to follow the steering wheel cover policy. In his evidence he said that he reached this conclusion because he accepted Mr Hill's evidence that he had seen the claimant working on the bus without the steering wheel cover while the steering wheel was on. He accepted Mr Hill's position that it was only when he went back some 10 minutes later that Mr Smith had removed the steering wheel. He preferred this account to that of the claimant who said that he had removed the steering wheel very much earlier in the day.

49 Mr Lewis did not provide any written reasoning with his decision but in accordance with the policy simply sent out the pro forma letter and the minutes of the disciplinary meeting. In evidence to me he stated that he preferred Mr Hill's evidence over that of the claimant because Mr Hill was a supervisor and had been completely certain in his evidence. Part of his decision had been what he thought was the claimant's hesitation and uncertainty. In cross-examination he confirmed that he felt the claimant had been uncertain about when he removed the steering wheel in answers given in the meeting. This was in answer to a question about when Mr Hill first spoke to the claimant and the claimant replied "yes, I think so, I'm sure it was". Again later in the meeting, at the point that Mr Lewis again puts to the claimant that Mr Hill stated he had removed the wheel after he spoke to him and asked if the wheel was on, the claimant replies "I'm sure it was".

50 Mr Lewis contrasted this to Mr Hill's statement that he was 100% sure. Mr Hill had also reported his version of events immediately to Mr Smith and also in an email sent that morning prior to the suspension. I accept Mr Lewis reached his conclusion on the evidence in the round and not just based on what must be questionable as hesitation in answer to a question.

51 Mr Lewis had spoken to the claimant's colleague and had a written statement from him. That colleague confirmed that he did not witness the conversation between Mr Hill and the claimant about the safety cover issue.



52 Mr Lewis gave evidence that he considered whether any sanction other than the dismissal was appropriate and concluded that it was not. This is an individual who had received appropriate training and had only a matter of days before this incident been advised again about what he needed to do. The respondent had to take health and safety very seriously and the consequences of a bus having its engine switched on were very serious. He was satisfied that dismissal was the appropriate penalty.

#### First appeal hearing

53 Mr Gilmore, a Fleet engineer, was appointed to carry out the appeal hearing. It was suggested that because Mr Gilmore had received the email from Mr Smith on 11 April he was not impartial. I have found that he did not reply to this email. I also conclude it would be usual practice for an individual in his position to be given this information and that this on its own is not sufficient to make it inappropriate that he chair the appeal. However, the inference of the email sent by Mr Smith is that the claimant has deliberately removed the wheel because the job he was undertaking was not steering related and questions "is he taking the p... s or what". This is expressing an opinion on the claimant's conduct which is potentially prejudicial to the outcome.

54 Mr Gilmore told me he took advice from HR who confirmed that it was appropriate for him to chair the hearing. The claimant did not raise issues of impartiality during the disciplinary process.

55 In advance of the appeal meeting Mr Gilmore was provided with all the relevant papers that had been part of the disciplinary process to date. He met with the claimant's representative Mr Hallett on 3 June. The appeal raised two grounds. The first was based on a disputed timeline of events and the second related to the ESOP not explicitly covering the removal of a steering wheel and the claimant having undertaken his own risk assessment instead.

56 To support his position the claimant now produced a copy of an invoice from the supplier which showed that he purchased an item at 9:12. He also produced an additional statement from Paul Barry confirming that the claimant had removed the steering wheel before he went to the supplier on the morning of 11 April. This information had not been put to Mr Lewis.

57 The claimant reiterated his position that he had removed the steering wheel before he went to the supplier and therefore it had been removed by the time that Mr Hill had the first conversation with him. Mr Hallett on behalf of the claimant challenged Mr Hill's timing.

58 Mr Hallett also argued that the SOP has faults because it says you must fit a steering wheel cover which means you can never remove the steering wheel to change it.

59 Mr Gilmore, after an hour's adjournment, upheld the dismissal. The notes of the meeting conclude he reached this decision because the job the claimant was doing did not warrant removal of the steering wheel. Paul Barry was not at the bus when he was spoken to by Graham Hill and that the claimant had decided to remove steering wheel and not to comply with policy.

60 Mr Gilmore is an experienced engineer and he was completely confident that the wheel removal was not necessary and did not accept the claimant's

argument on this point. He did not find the references to timings contained in the statements and the visit to the supplier helpful in determining the issue. He considered what was put him as a discrepancy in Mr Hill's timings, and concluded that they were approximate only. In answer to cross examination questions he confirmed again that he was influenced by what he felt was Mr Hill's certainty and the claimant's less certain responses given to Mr Lewis.

61 I find that in reaching his decision Mr Gilmore considered the evidence in the round and reached a conclusion which was both reasonable and possible on the evidence before him.

62 Mr Gilmore had considered whether a lesser penalty was appropriate but also concluded that it was not, despite the claimant's clean record and length of service because it is not a case where there had been a lack of training and the issue was a very serious one.

63 Mr Gilmore set out his response and conclusions in the letter of 5 June. The claimant appealed against this decision. This appeal meeting took place on 25 June 2019.

#### Final Appeal

64 The final appeal hearing was chaired by Mr Wickers, managing director of the respondent. Again there were two main issues, the assertion from the claimant that he had not been working without a cover in place because the steering wheel had been removed and, secondly the severity of the penalty, when considered in the context of the SOP not expressly dealing with a situation when a steering wheel had been removed

65 Again the meeting ran through the timing of events. He explained in more detail on this occasion. He said that at around 6 a.m he and Mr Barry were allocated the task to look at the depreciation of the foot pedal. He was in the cab, Mr Barry took the bus up into the air they tested depreciation twice and shouted out what they were getting on the gauge. The cover was on all this time.

66 However, having identified that the front was working all right the claimant realised the problems were at the rear of the bus so Mr Barry raised the bus in the air again. The claimant said that he had to lean out of the cab window in order to hear Mr Barry because he had an ear infection. He removed the steering wheel in order to see the gauge as the dash was off. He then realised he had to purchase a part and left at about 8.30 a.m to do this.

67 He collected the part at 9.12 a.m, came back and did further checks again. The steering wheel was off all this time. It was at this point that Mr Hill came over about not wearing goggles and a safety hat. This was somewhere between 9.30 and 10 a.m. Some 20 minutes later Mr Hill then came over and suspended him.

68 Mr Hallett said that the claimant's statement had been clear and consistent all the way through. Mr Hill's timeframes did not fit. At one point in the meeting it was said that Mr Hill was lying. While this statement was withdrawn by the trade union rep, the claimant's evidence before me was that he believed Mr Hill had been lying in order to save his job. He accepted that he had not raised this point during the disciplinary procedure.

69 Mr Hallett also said that it had been alleged that the claimant had taken the steering wheel off to avoid using the cover, but that had not been investigated. There was no investigation regarding whether the gauges needed to be checked. Here there were two individuals who stated the wheel had been removed before 9 a.m and one stating it was taken off after half past nine. Management had looked at this with tunnel vision throughout. The claimant had not had a fair hearing into why he had removed the steering wheel. It was also put on behalf of the claimant that he had removed the steering wheel many, many times before and nothing had been said. It did not put anybody in danger and he had made a reasonable adjustment to the policy. Further, the claimant's medical condition meant that he needed to make adjustments and he should have been sent to occupational health.

70 Mr Wickers adjourned to consider the position. On return he concluded that Mr Hill was adamant the steering wheel was on when he had the first conversation. The allegation is about not putting a steering wheel cover on and he considered that the evidence was this had happened. This outcome was recorded in writing on 27<sup>th</sup> of June 2019.

71 In his witness statement and evidence before me Mr Wickers expanded the reasons for his decision. While he is not an engineer he was satisfied that experienced engineers were correct that there was no need to remove the steering wheel, even taking into account the claimant's issues with his hip and the work being done. No further investigation on that point was therefore required. He also concluded that taking the evidence into account the claimant had failed to use the cover when required to do and then decided to remove the steering wheel instead without a credible reason for that.

72 As far as penalty was concerned Mr Wickers took into account length of service and clean record and the claimant was given credit for both these points. He concluded, however, that Mr Lewis had applied the appropriate sanction because this was a serious failure to follow the SOP and was worsened by an attempt to avoid doing so by the subsequent removal of the steering wheel.

#### The claimant's evidence

73 The claimant raised and expanded upon a number of matters in his evidence before the tribunal. He explained that, as was well known to the respondent, he had been born with a particular medical condition. He had had an operation on his hip in in 2015 which again was well known to the respondent as he been off for five months during which had been paid.

74 It was partly because of the pain that he was in due to his bad hip that he needed to remove the steering wheel. To do the job in question he had to compare gauge readings with his colleague and do so he needed to lean out of the window of the cab at a very awkward angle. As the dashboard was out, both for his own comfort and in order to see the gauges ,the steering wheel needed to be removed.

75 The claimant accepted that he had never asked the respondent to make any adjustments to his work tasks because of his hip. He accepted that he had never expressly raised any concerns with the way in which he had to do tasks, but had instead always put in place his own adjustments. He also accepted that there was another way of doing the job which did not require him to lean

awkwardly out of the window, although he had always done the job in the same way and no one had ever picked him up on it.

76 The claimant also accepted that the SOP did not allow for safety workarounds but he was adamant that what he had done was 100% safe. His position was that if he could make work safer, then there would be no harm in that. He reiterated that he had done his own risk assessment and was comfortable that he had made it 100% safe. He considered that even though the steering wheel cover was not put on the steering wheel column once the wheel was taken off, the fact that the cab was largely raised in the air with no ladders readily available and that he was either around the bus, or in the smoking shelter within sight of the bus, meant that it was safe not to have used the cover but to have relied on the fact that the steering wheel was removed.

77 He further stated that the SOP does not say what to do when the steering wheel is removed, that he has done this often and there is no policy to say that one cannot take the steering wheel.

#### Relevant Law

78 There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR). In this case the parties agree that the reason was conduct and it was the respondents position that the conduct included dishonesty.

79 Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

80 Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

*"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

81 By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

### Compensation

82 I refer to Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) which established the following principles: Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair. Having found that the dismissal was unfair because of the procedural failing, the tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair.

83 The compensatory award may be reduced where the claimant's conduct has contributed to the dismissal, commonly referred to as "contributory conduct" or "contributory fault". The reduction can be anything up to and including 100%.

84 The basic award may be reduced where the claimant's conduct before the dismissal is such that it would be just and equitable to reduce the award. There is no need for the conduct to have contributed to dismissal or for the employer even to have known about it at the time of dismissal

85 Where the tribunal finds that the dismissal "was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding" (section 123(6), ERA 1996).

86 Three factors must be present for a reduction of the compensatory award for contributory fault: The claimant's conduct must be culpable or blameworthy. It must have caused or contributed to the dismissal. The reduction must be just and equitable (Nelson v BBC (No.2) [1979] IRLR 346 (CA)).

### Wrongful dismissal

87 Wrongful dismissal is a dismissal in breach of contract. Fairness is not an issue: the sole question is whether the terms of the contract, which can be express or implied, have been breached. The employee will have a claim in damages if the employer, in dismissing them, breached the contract, thereby causing them loss.

88 There may be cases where a misconduct dismissal is fair, but a tribunal considers that the conduct in question was not sufficiently serious to amount to a repudiatory breach warranting summary dismissal.

### Conclusion

89 Applying the relevant law to the findings of fact I have made I conclude that the claimant was dismissed for gross misconduct. This is a fair reason for dismissal. However, in considering whether dismissal is fair the respondent must have a genuine belief the employee was guilty of misconduct, have reasonable grounds for that belief and have carried out a reasonable investigation in all the circumstances.

90 On the facts of this case the claimant accepts that he did not have a steering wheel cover on the steering wheel. The dispute that ran through the disciplinary procedure was whether Mr Hill was to be believed that the claimant

removed the wheel after having been spoken to about the lack of the cover, or whether the claimant's account was to be preferred, that the wheel had been removed before that conversation.

91 Both Mr Lewis and Mr Gilmore had said in cross examination that they were influenced in reaching their decision by what they said was the claimant's uncertainty as to timings and when the wheels removed which are in the notes of the hearing that Mr Lewis held. If this had been the sole reason for their conclusion then this would be at the least questionable. However, looking at their evidence in the round they gave a consistent account of what had occurred and in reaching their decision they considered all the evidence the claimant had produced. I have concluded that their decision was based on all the witness statements as well as the contrary evidence the claimant produced, and they reached their conclusions taking all of this into account. I conclude that they had a genuine belief that the claimant had not used the steering wheel cover.

92 I also conclude that they had reasonable grounds for that belief as they had carried out a reasonable investigation in all the circumstances. While in the final appeal the claimant challenged what he said was the lack of investigation into why he had taken the steering wheel off, I conclude that he had provided information about this. The claimant did raise the question of his hip. On every occasion when questions arose additional witness evidence was sought, either by the respondent of his own volition, for example Mr Lewis seeking additional information, or in response to requests by the claimant.

93 The employer's decision must also be within the range of reasonable responses which a reasonable employer would make in the circumstances. The consequences of failure to follow this health and safety instruction had been very clearly set out by the respondent to its workforce and the claimant fully understood the position. Dismissal was within the range of reasonable responses. I was satisfied that the respondent had considered the claimant's service and record in reaching this conclusion.

94 The claimant contends that the respondent failed to follow a fair procedure and did not conduct a full and proper investigation that was appropriate in all the circumstances. In particular, the respondent did not inform the claimant of the allegation against him. I have concluded that while the claimant did not receive a suspension letter, he was told the reason for his suspension at the time, the allegation he had to meet was set out in the invitation to the investigation meeting and he was given time at that meeting to talk about it and consider it. I have found that the claimant was aware of the allegation against him.

95 It was also submitted that the claimant was not afforded the opportunity to state his case and the respondent did not provide an explanation for its decision. I have found that there was a lengthy process in which the claimant was supported by his trade union representative. Several adjournments were given throughout the procedure and the claimant was given every opportunity to put his side of events.

96 The fairness of the procedure is challenged because the decision-makers did not make or maintain a note of the reasons behind their decisions. The respondent's template letters do not provide an opportunity to set out reasons for a decision but simply say that the meeting notes are attached. These do, albeit

briefly, explain the decision-makers reasoning. Mr Gilmore's letter of 5 June also gives more details. I conclude that sufficient reasoning was provided to the claimant and any lack of notes by the decision-maker is not a procedural issue which causes prejudice to the claimant.

97 The claimant also challenges the procedure as unfair because the respondent failed to provide adequate witness testimony and/or obtained that testimony in an improper manner. I have found that the claimant was not provided with all the relevant witness statements before the investigative meeting, but this was corrected before the disciplinary hearing. There were two occasions when additional witness evidence was obtained by the decision-maker which was not put in writing to the claimant, but on both these occasions the claimant had sufficient time to respond to the narrow points these witnesses were responding to. I conclude that the respondent did provide adequate witness testimony which was obtained properly.

98 Mr Gilmore was said not to be a neutral appeal chair. I had some concern about the nature of the email Mr Gilmore had received in advance. Had it been limited to facts only, no issue of prejudice would in my view arise. In this case negative opinion is also expressed. On balance, I conclude that Mr Gilmore would be in the habit of receiving emails but all incidents because of his position, he did not respond to it and therefore this did not prejudice his ability to act as an impartial decision-maker.

99 On this basis I conclude that the dismissal was for a fair reason and was both substantively and procedurally fair. I also conclude that the claimant's conduct was sufficiently serious to dismiss and the claim for wrongful dismissal fails.

Employment Judge **McLaren**  
**Date: 4 March 2020**