Case No: 1805268/2019
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr C Booth

Respondent: Transdev Blazefield Ltd

Heard at: Leeds (by CVP) **On:** 1-2 September 2020

Before: Employment Judge Parkin

Representation
Claimant: Mr A Macmillan, Counsel
Respondent: Ms R Jones, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1) The claimant was fairly dismissed by the respondent and his unfair dismissal claim is dismissed; and

2) The claimant was not wrongfully dismissed by the respondent and his breach of contract claim is dismissed.

REASONS

1 The claim and response

1.1 By a claim form presented on 8 October 2019, the claimant claimed unfair dismissal and wrongful dismissal from his post as Transport Manager with the respondent, based at York and Malton, on 30 May 2019. He set out that he had been dismissed summarily for three counts of alleged gross negligence consisting of allowing a bus to be used in service without an MOT certificate, failing to follow the advice of a health and safety professional in respect of a student's work experience and cleanliness of the depot and bus fleet. He maintained the respondent did not genuinely believe he was guilty of the allegations and had failed to adequately investigate them and to treat him consistently with other employees in similar circumstances. Although he accepted the bus was used in service without

an MOT certificate, he maintained the respondent failed to investigate the extenuating circumstances not least its one off nature and the fact it had been transferred from Burnley and so had not been included in the MOT plan and that he did follow the advice of a health and safety professional in respect of a student's work experience. Problems of cleanliness of the Depot and fleet were longstanding but he had tried to resolve them with limited support from the respondent, despite his requests. The matters did not amount to gross negligence and the appeals in his case did not adequately re-investigate the allegations against him fundamentally undermining their fairness.

1.2 In its response presented on 8 November 2019, the respondent admitted summary dismissal which it contended was for gross misconduct based upon two incidences of gross negligence in his role as General Manager, which included being nominated Transport Manager for York and Malton. These were so serious as to warrant summary dismissal, namely his serious neglect of duty in permitting a vehicle to be used in service without a valid MOT certificate and not following the advice of a health and safety professional around the protection of a vulnerable person. It stressed the importance of his role as Transport Manager and contended the allegations had been fully investigated and the circumstances considered and the claimant's grounds of appeal taken into account during the appeals process. It accepted that cleanliness issues were longstanding, but contended that he was not dismissed and only given a written warning for this aspect.

2 <u>The Issues</u>

2.1 Unfair Dismissal: The parties agreed that the issues were the standard issues for an unfair dismissal claim, namely that the respondent had to prove a potentially fair reason for the claimant's dismissal and, if it did so, applying section 98(4) of the Employment Rights Act 1996 (with no burden of proof either way), whether in all the circumstances (including the respondent's size and administrative resources) it acted reasonably in treating this as a sufficient reason for dismissing the claimant.

2.2 The claimant contended particularly that the respondent did not have any genuine belief in his guilt of acts of gross misconduct, but that his dismissal was set up, in the sense that he was being managed out of the business; he maintained the respondent failed to investigate the circumstances sufficiently both initially and on appeal and also did not treat him consistently with how other employees had been treated on health and safety issues.

2.3 Wrongful Dismissal: In respect of the breach of contract/wrongful dismissal claim, the parties agreed that although strictly the burden may be upon the claimant, this claim would succeed unless the respondent proved it was entitled to dismiss him summarily because he had been guilty of gross misconduct or some other repudiatory breach of his contract of employment. Accordingly, for this claim, the tribunal had to determine whether he was indeed guilty of gross misconduct or repudiatory breach.

3 <u>Case management at the hearing</u>

3.1 It was agreed that a formula "Student A" would be used for all references to the student on work experience.

3.2 The claimant's counsel raised the reference at paragraph 16 of his witness statement to a discussion in November 2018 of possible agreed terms of termination of employment; the respondent's counsel accepted that no "without prejudice" negotiations were involved and that the claimant could cross-examine witnesses about this, although it was not calling the individual the claimant had named.

3.3 In addition to the agreed Bundle of 420 pages, during the hearing the respondent produced a written Disciplinary & Grievance Procedure it said it had followed. The procedure named Harrogate & District Travel Ltd and was quite historic, but later the actual Discipline & Grievance Procedure for Yorkshire Coastliner Ltd was produced as part of a Company Handbook. The content was identical in all material particulars to the Harrogate procedure. In fact, as agreed by the claimant through his counsel at the hearing after an explanation by the respondent's counsel upon instructions, the disciplinary procedure set out in the Handbook was incomplete because that followed at Yorkshire Coastliner involved a second stage of appeal by local agreement.

3.4 Since there was insufficient time to complete submissions on the second day of hearing, the parties agreed to provide them in writing. Both parties provided their submissions on 4 September 2020, with the respondent providing additional comments on 8 September 2020 and the claimant not seeking to do so.

3.5 Two written documents in the Bundle were relied upon in evidence by the claimant. Both of these were only provided for this hearing, not at the internal stages of disciplinary or appeal hearings. At p.111, there is an undated letter from the father of student A, now sadly deceased, and at pp. 413-414, an email written to the claimant on 17 October 2019 by Alan French, a former colleague of his and manager of the respondent (who covered the Yorkshire Coastliner role after the claimant was dismissed). Mr French did not give oral evidence but there was no suggestion that he was unable, unavailable or unwilling to give evidence and his email itself speaks of great disillusion about the respondent's senior management; in these circumstances, the content of these documents prepared after proceedings were commenced needed to be treated with some caution.

4 <u>Witnesses and credibility</u>

4.1 The respondent called Vitto Pizzuti, now its Operations Director then its Head of Delivery, who was the claimant's line manager and the dismissing officer and had considerable experience of handling disciplinary hearings; Paul Turner, its Commercial Director, who heard the first appeal, and Alex Hornby, the Chief Executive Officer, who heard the final appeal. Each of those witnesses, especially Mr Pizzuti and Mr Hornby, was cross-examined extensively as to the dismissal being pre-determined and not genuinely for the reasons stated. The claimant, Colin Booth, gave evidence on his own behalf and was cross-examined heavily upon his responsibility for the missed MOT and failure to follow the health and safety advice over Student A.

4.2 Mr Pizzuti was generally accurate and credible save on two aspects: when dealing with the meeting of 29 November 2018 and when recounting his decision-making process as his alone. The Tribunal did not accept that the claimant himself raised the prospect of an agreed termination and package of £20,000 but found that Mr Horgan had done so. It was not consistent with the sequence of events thereafter that the claimant would have sought departure on agreed terms; Mr Pizzuti had not dealt with this at all in his witness statement and deliberately downplayed the part played by Mr Horgan. Also, it was not credible that he would decide the outcome on a number of disciplinary allegations by himself and then prepare an 8-page detailed draft outcome letter, picking out those for which he was dismissing and those he would only have given a warning for, but only then checking his decision and letter with Mr Douglas, the recently appointed Head of HR who was present at the hearing as witness and note-taker. However, the Tribunal concluded that these features did not undermine the whole of his evidence nor show that he was acting in bad faith throughout. It accepted as compelling his evidence that he was taken aback at the way the meeting on 29 November 2018 developed and particularly that, at the disciplinary hearing, the claimant never told him he had done an internal risk assessment, saved it and sent it on to Steve Smith (and that he had not been aware the claimant was saying so until the hearing at Tribunal) and also that the first he knew of student A's presence was finding him under a vehicle at York depot.

4.3 Mr Turner played a lesser role, holding the first appeal hearing by way of a review. He was a manager with less contact with claimant and not in a line management role over him. He was a convincing witness, especially when refuting the claimant's argument that vehicle 703 was not a York bus.

4.4 Mr Hornby held the second stage appeal. Demonstrably from the correspondence in the Bundle he was a dynamic CEO and a hard taskmaster and the Tribunal found him a convincing witness as to how the MOT omission could be (and how the vehicle's insurance would be void as a result) and potential risk to the Operator's licence, his own unawareness of the placement of Student A and the lack of company risk assessment. The Tribunal accepted his evidence that he had not sent Mr Horgan to offer the claimant an agreed termination package in November 2018 and had not pre-ordained the claimant's eventual dismissal.

4.5 The Tribunal found the claimant often unreliable in his recollection of events, bringing in much self-justification in hindsight. In his witness statement, he listed his duties as General Manager but failed to mention the core role he held as Transport Manager when doing so. His strong assertion that bus 703 was a Burnley bus being loaned back to York depot was not always the way he had described it; in his claim form, he referred to it being transferred back to York and, at paragraph 35 of his witness statement, to it having been on loan at another depot. Most significantly, the claimant never stated clearly and explicitly in the investigation meeting, disciplinary hearing or appeals that he had indeed filled in a risk assessment on Stephen Smith's template, saved it and forwarded it to Mr Smith as expected. The Tribunal found it inconceivable that, with Full Time Officer representation from his trade union throughout, he would not have made this absolutely clear, not least when Mr Pizzuti expressly concluded Mr Smith's instructions had not been followed and spelt this out in his letter of dismissal. Only

at the Tribunal hearing, some 15 months on, did it become clear that the claimant was indeed maintaining that he had completed a risk assessment on the respondent's template and lodged it on his computer and believed he had sent it on to Mr Smith. Paragraph 22 of his witness statement, although saying: "I used it (Stephen Smith's risk assessment template for a young person) as a template to draw up the assessment for (A)" fell well short of asserting that he prepared the risk assessment and then provided it to Mr Smith and the college in good time before the student started and so Steve Smith could carry out an induction. Whilst accepting his version that he had a conditional approval of the work experience student's attendance from the Engineering Director Mr Irvine, the Tribunal found him unreliable on the fundamental issue of him having made a company risk assessment.

5 The facts

From the oral and documentary evidence the tribunal made the following findings of primary fact and drawings of inference on the balance of probabilities.

5.1 The respondent is a major public transport undertaking operating public service vehicles in Lancashire, Greater Manchester, North and West Yorkshire, with over 1270 employees and 500 buses. It has various subsidiary companies which operate different franchises and routes.

5.2 The claimant was appointed as a General Manager with effect from 1 June 2014, initially to manage the operations at Keighley depot. Then in April 2018 he was transferred to manage York depot, covering also Malton depot, again as General Manager. The operation at York and Malton was the Yorkshire Coastliner Ltd subsidiary. The depots together were smaller than Keighley, with a combined fleet of about 35-47 vehicles, whereas Keighley had some 110 vehicles. The claimant also became the nominated Transport Manager on the respondent's operator's licence, as he had been at Keighley. No new or revised contract of employment was provided in respect of the move to York and Malton.

5.3 The nominated Transport Manager role at any depot is central to the running of that depot and makes a personal declaration to effectively and continuously manage the transport activities of the licence holder (p.107 declaration). The Transport Manager needs to comply with the statutory requirements laid down by the Senior Traffic Commissioner, who provides detailed guidance and directions under the Public Passenger Vehicles Act 1981 (pp.69-103,) in particular about the heavy personal responsibility under the declaration and the fact that the Transport Manager's "repute" ie. reputation is at stake, (paragraphs 23-25 on p.74).

> Paragraph 25: "A Transport Manager must always be more than just a transport manager in name. A Transport Manager risks their repute if they find themselves in this position. If the transport manager finds themselves overwritten by the operator Or their agent to a point where the manager no longer has the requisite continuous and effective responsibility, the Transport Manager must first notify the operator in writing, and then, if the matter is not resolved, is supposed to take appropriate action. In certain circumstances, his may even include resignation..."

Under General Responsibilities at Paragraph 54 are included under "Vehicle – administration":

> "To ensure a suitable maintenance plan is completed and displayed appropriately, setting preventative maintenance inspection dates at least six months in advance and to include the Annual Test and other testing or calibration dates"

And, under "Vehicle- management":

> "To ensure that safety inspections and other statutory testing are carried out within the notified O-licence maintenance intervals…" (84).

5.4 The claimant's contract of employment (43-51) made brief reference to the Company Disciplinary Procedure and, under Termination of Employment, set out:

> "Employment may be terminated by Transdev PLC and you with three months written notice on either side thereafter.
>
> Transdev plc shall be entitled to discharge its notice obligation by making a payment in lieu thereof.
>
> Transdev reserves the right to terminate your employment without prior notice if you:
>
> (i) Fail or neglect efficiently and diligently to carry out your duties or be guilty of any material or persistent breach or non-observance of any conditions of employment,
> (ii) Be guilty of any gross misconduct or conduct that is calculated or likely to affect prejudicially the interests of Transdev, whether or not such misconduct or other conduct occurs during, or in the context of your employment …".

5.5 The Yorkshire Coastliner disciplinary procedure included the following:

"Gross misconduct

As will be appreciated, no fixed award can be laid down for any offence. However, the following examples of offence are the kind, which may result in summary dismissal:

a) consuming intoxicants on duty, or taking up duty under their influence
b) entering licenced premises whilst on duty
c) reporting for duty under the influence of drugs
d) misappropriation of company cash or property
e) Ticket and fare irregularities
f) accidents caused by negligence
g) assaults or threatening behaviour
h) conviction in the court of law for an offence which renders the employee unsuitable for continued employment
i) taking up other employment or passing on information of a commercial nature which conflicts with the business interests of the company or which results in a breach of the law eg drivers hours regulations

j) racial or sexual abuse and or bias against another employee, member of the public, or customer
k) falsification or disfiguration of company time keeping or work records
l) vandalism or misuse of company property

This is not intended to be a complete list but indicates the type of serious misconduct which will lead to summary dismissal."

5.6 Within a comprehensive and detailed job description and person specification accompanying the contract of employment (52-3) was a statement of the claimant's Job Purpose:

> "To ensure at all times the safe and efficient operation of all operations out of Keighley Depot whilst having due regard to all relevant legislation."

Under Duties and Responsibilities, it included that he was:

> "3. To be the nominated Transport Manager (for Keighley & District Travel Ltd)…".

Alongside the role of Transport Manager, these can be summarised as managing the running of the buses, the allocation of drivers to routes, managing staff absence, organising the safety and cleanliness of buses, organising the hire and decoration of fleet buses for special events, attending training, attending management meetings and feeding back about York and Malton.

5.7 The claimant had to oversee the Yorkshire Coastliner twitter account which received frequent complaints from customers. Whereas bigger depots had a nominated person to deal with complaints, the claimant generally had to deal with and respond to them himself for York and Malton.

5.8 The claimant, who had a clean disciplinary record with the respondent (as he had done with his previous employer) reported directly to Vittorio Pizzuti, Head of Delivery (who had started with the respondent in May/June 2018 shortly after the claimant moved from Keighley) and then to the Chief Executive Officer, Alex Hornby, who had joined in early 2015.

5.8 The claimant felt unsupported by his senior management and blamed for things he was not responsible for in particular in respect of the longstanding problem of cleanliness of York depot and buses. There were two cleaners but one was off sick for a period, putting great pressure on the other. There were cleaners at Malton who could be moved temporarily and the claimant sometimes arranged this. However, the Tribunal found that his predecessor had been given permission to recruit another cleaner and this permission carried over to him with Mr Pizzuti specifically confirming the permission when cleanliness issues at York were raised with him.

5.9 At York, for most of the time he had no Engineering Manager to support him after Andy Senior left that role in Autumn 2018. Thus, as well as being Transport Manager the claimant was wholly responsible for the engineering and vehicle maintenance side. The respondent's decision to run the operation from then on at York and Malton without an Engineering Manager was consistent with its approach

at smaller depots. Even with Mr Senior in place as Engineering Manager based at York, the claimant had remained throughout the responsible Transport Manager for both depots.

5.10 Whilst his operational line manager was Mr Pizzuti, on the engineering side there was the Fleet Engineer, Ian Chadwick, and ultimately the Engineering Director, Gordon Irvine, who provided support for the whole of the respondent's operation across the subsidiaries.

5.11 In Malton, the claimant had a reliable Engineering Supervisor, Darren, who carried out planning work as well as overseeing the engineering and servicing. At York, the experienced Engineering Supervisor, Eric Close, resigned from that position in March 2019 and the claimant appointed an acting Engineering Supervisor, Phil Akers, who he had to persuade to take the position and who was not confident to do the planning work, only the engineering oversight.

5.12 In early June 2018, the claimant was approached by a Yorkshire Coastliner driver from Malton to see if work experience could be arranged for his son who was at college, Student A. It was intended that the placement start in September. The Tribunal found that the claimant telephoned the Engineering Director, Gordon Irvine, in the presence of student A's father and was given conditional permission to take the student on work placement, the conditions being that a full risk assessment was made both internally and by the college. The claimant then contacted Stephen Smith Group Health and Safety Manager who provided a tailored risk assessment template with his email to the claimant and Andy Senior, the Engineering Manager at York, which was copied to Mr Irvine (122):

> "Hi Colin, Andy
>
> Attached is a new work experience risk assessment for the young person at York. Please review, if you have any additions/improvements let me know and I will amend the master.
>
> Let me know when the young person is due to attend and I will arrange an induction covering the depot and garage?...".

Since the email was copied to him, the clear implication was that Mr Irvine was aware and gave permission, subject to the necessary health and safety conditions being in place. Mr Smith's template had been based on an earlier placement at Keighley and he anticipated that the claimant or Mr Senior would finalise it for the York depot placement.

5.13 On 6 September 2018, Andy Senior became aware that the student was to start the following week but was unhappy at the situation (130-131). He emailed Mr Smith and claimant, copying in G. Irvine, E.Close:

> "Hi Steve/Colin
>
> I'm told a driver's son from York has been accepted into the York garage workplace this to do work experience
>
> Please see link below which outlines the guidelines for young people I'm told all relevant paperwork has been completed?

> Steve has a risk assessment being undertaken?
>
> I'm not sure this is the way to go due to nature of the operation in York at the moment [flat out] Both myself and Eric are not happy with the situation
>
> He would probably be better suited in a larger location such as Harrogate if it was decided this was the way to go
>
> It would appear there may already be some sort of allergy due to not being able to wear polyester overalls so exposure to other chemicals/sprays etc need to be considered
>
> This is due to start next week? Please advise."

The email ended with a link to the Health & Safety Executive's website dealing with young people and the law.

5.14 Mr Smith replied to Andy Senior and the claimant on 6 September 2018, again copying in Mr Irvine and the supervisor, Eric Close:

> "No risk assessment has been undertaken by myself so unless one has been completed he shouldn't be allowed access to the workplace. As the line manager and supervisor if you consider it inappropriate then that has to be noted on any Risk Assessment?"

5.15 The same morning this was followed up by Andy Senior to Stephen Smith and the claimant, again copying in Gordon Irvine and Eric Close:

> "Hi Colin.
>
> Think this may need to be put on a back burner till all parties are happy
>
> Steve Smith needs to be involved Regards
>
> Andy"

5.16 There is no documentary evidence of a finalised risk assessment being carried out on the respondent's template nor of any further contact by the claimant with Mr Smith. The Tribunal concluded that no final risk assessment was completed on the respondent's template provided by Mr Smith and none was shared with him so he could arrange the appropriate induction.

5.17 The actual start date of the student on work placement is not certain. It was not as early as a week after Mr Senior's email and may have been 19 October 2018 when the paperwork from Student A's college was completed, although the claimant's oral evidence was that it was around the end of September. On 19 October 2019, the claimant signed an "Agreement for Provision of a Work Placement for Students" with the college on behalf of the respondent and a risk assessment "Employer/Location Health and Safety Assessment Record" (163-169). The college's risk assessment identified the risk rating as a high risk industry and the workplace as the York depot, but was less finely tuned than the respondent's internal template which involved a scoring system and "traffic light" highlighting of risks. The intended work experience base (and thus the place where the respondent had to provide Employer's Liability Compulsory Insurance details in respect of) was the York depot.

5.18 Soon after the student started at York, in November 2018, the claimant took the decision to move the work experience base to Malton as it was safer and less busy and a better learning environment. There is no documented evidence of a new risk assessment being carried out for the new location nor of specific contact with the college about the change of location nor of any further contact with Mr Smith about this. The Tribunal inferred that the claimant made the decision on this unilaterally, with Mr Senior still expressing concern as to the suitability of work experience at York.

5.19 Until just before April 2019, the student continued his work experience one or two days a week at Malton. The fact of the student being on placement was well known to many employees at York and Malton, but not to senior management including Mr Pizzuti, Mr Irvine and Mr Hornby. The student returned to York for his final few weeks when he and the Engineering Supervisor at Malton, Darren, had a falling out. The claimant then moved the student back to York to complete his placement, again making this decision unilaterally.

5.20 In the late summer/autumn 2018, the respondent's senior management were pressing the claimant on his performance as General Manager, raising concerns frequently about buses being out of service and him needed to hire in buses for special events, Pride and the Great North Run; cleanliness of buses and uniforms at York and his slowness in dealing with restructuring the depots and staff changes. By September/October 2018, Mr Senior had ceased to be Engineering Manager at York and the respondent's senior management had determined he was not to be replaced, since York and Malton combined were a small operation.

5.21 On 22 Oct 2018, Mr Pizzuti visited the Claimant at York accompanied by the UK & Ireland Director of HR, David Horgan, whom the claimant had never met before. Mr Pizzuti took the HR support at that time particularly because he was concerned about high staff absence levels at York, seeking Mr Horgan's assistance because the local HR Manager was on long term sickness absence. Mr Horgan expressed to the claimant the view that the respondent was not happy with performance and that he was "not right for the business". However, when the claimant inquired, he backtracked saying no formal procedure was being implemented and the claimant stressed that he was meeting the KPIs (key performance indicators) which he had been set.

5.22 That meeting was followed by Mr Pizzuti writing to the claimant on 5 November 2018 that concerns about absence levels, lack of response to customer complaints on social media, depot restructure delays, facilitating a sick driver with shadowing role, an unresolved issue concerning a "wheelchair customer" and cleanliness had all been discussed (187-8). Mr Pizzuti wrote that if significant improvement in performance was not identifiable, the respondent may have no option but to instigate formal disciplinary action up to and including dismissal.

5.23 On 29 November 2018, Mr Horgan visited York again with Mr Pizzuti. Mr Horgan suggested there had been no improvement in the claimant's performance and told him he would be invited to a disciplinary meeting in Harrogate, with a likely outcome of dismissal. On this occasion, the meeting got out of hand and developed into an argument and shouting between Mr Horgan and the claimant. Mr Horgan offered the claimant a settlement package (of £7,000 with 3 months' pay in lieu of

notice, in the region of £20,000) and the opportunity to leave his reputation intact, which the claimant angrily refused saying he had improved performance at York and Malton. Another employee had come into the room during the argument, which would also have been heard by other members of the workforce. Mr Pizzuti was taken aback, shocked and embarrassed at the way the meeting developed.

5.24 The Tribunal concluded that Mr Horgan did not merely act inappropriately (not least for an HR Director), but he had acted without authority on 29 November, speaking and making an offer to the claimant in a manner not authorised by Mr Pizzuti nor even by Mr Hornby, to whom Mr Horgan did not report.

5.25 Mr Pizzuti rang the claimant the next day and told him to forget the incident with Mr Horgan. Understandably, the claimant found it difficult to do so and believed from then on that rumours that he was to be dismissed or to leave soon became common.

5.26 Mr Pizzuti wrote again to the claimant on 7 December 2018, raising 7 areas of concern: covering staff absence and "lost mileage" (which he acknowledged the claimant was showing improvement on), social media complaints, depot restructure, sick driver given shadowing role, "wheelchair customer" issue and cleanliness. He reiterated the warning given previously that if no significant improvement was readily identifiable, disciplinary action up to and including dismissal may be instigated (191-2).

5.27 In the event, no disciplinary proceedings were commenced soon after that meeting and letter. On 28 Dec 2018, Mr Pizzuti held a personal meeting with the claimant and settled his Personal Development Plan (PDP) for 2019 (193-8), anticipating mid-year and end of year reviews. Other managers were also getting PDPs, but the claimant's PDP was closely allied to the warning letters he had received. Mr Pizzuti told the claimant to forget the argument with Mr Hogan and they discussed how to go on improving the York Depot.

5.28 During early 2019, Mr Pizzuti and Mr Hornby continued to press the claimant about buses being out of service, appearance and cleanliness of buses and lack of response to social media complaints.

5.29 In early 2019, York's bus 703 (YG52GDJ) was sent on loan to Burnley depot (a different subsidiary company), for a specific small vehicle contract although it does not appear it was used for that purpose but was off the road at Burnley. A report completed at York on 5 March 2019 identified a missed inspection for 703 on 4 February 2019 as it had been: "Taken away from Depot and stored VOR (vehicle off road)" (231). Bus 703 was then returned to York to fulfil a contract which York needed it for but without its documents. It was serviced and inspected at York on 5 March 2019 (232-3) and again on 3 April 2019 (282-3) and returned to traffic use.

5.30 Loans from one depot to another were not uncommon but the responsibility for maintenance of a vehicle remained with the operator registered with the Traffic Commissioner for that vehicle. Ideally, the documentation covering the vehicle should transfer across with the vehicle. Whilst loans of vehicles were common, An operator using another company's vehicle under loan should use it for only 14 days at a time and then return it to the other company (or keep it off the road for another

14 days before any further use), unless it was re-registered with the Traffic Commissioner under the Operator's Licence.

5.31 The regular service and inspection plan for each vehicle included a monthly inspection of each vehicle and a heavier service and inspection annually shortly before its MOT. Bus 703 had been included on both the 2018 and the 2019 York service planners as a York bus, but the 2019 major service and MOT was apparently taken off the planner as a result of the loan to Burnley and not reinstated when the vehicle came back to York.

5.32 On 9 March 2019, Alex Hornby visited York depot with Vitto PIzzuti and was critical of standards of cleanliness, bus appearance and driver uniform he found there.

5.33 Ian Chadwick, the Fleet Engineer, had been monitoring the cleanliness issues at York and made an early morning inspection of York depot on 1 April 2019. He took photographs and was very critical of the cleanliness and appearance of buses, concluding:

> "There is a lack of pride and poor quality seems to be the normal approach they need to be refocused on service delivery and engineering to tidy up some clearly poor repair standards. After several discussions with Colin regarding vehicle presentation, the standards have not improved" (254-275).

In fact, this was the Monday morning straight after Mr Chadwick had arranged for outside contractors to repair two vehicles over the weekend. However in evidence, the claimant expressly did not suggest that Mr Chadwick was any part of a set-up to dismiss him and acknowledged that York Depot was not the tidiest of garages because its workspace was small for the number of buses.

5.34 On 2 April 2019, a Social Media report which was highly critical of the claimant was prepared by Matt Harrison, Marketing and Communications Assistant about lack of attendance of York and especially Malton employees on mandatory social media training and poor response to customer complaints on Facebook and social media (276-281).

5.35 At a Business Review meeting with Vitto Pizzuti on 16 April 2019, there was discussion of vehicle 703 being loaned to Harrogate for the flower show there. The claimant said that the MOT for bus 703 was due in May before the vehicle was to go on loan for the flower show. In fact, although the vehicle was in service on 14 journeys on 7 separate days over the period from 9 to 17 April 2019 (285), its MOT had expired on 6 April 2019, such that its use after that date was unlawful.

5.36 By letter dated 18 April 2019 from Vitto Pizzuti, the claimant was then called to a formal disciplinary hearing on 25 April 2019 to face potential charges of misconduct related to his consistent poor performance and incompetence within his role as General Manager (290-1). The allegations related to: the overall cleanliness and condition of the buses at the York Depot and the lack of appropriate and timely responses to customer complaints. Copies of the respondent's letters dated 5 November 2018 and 7 December 2018 were provided to the claimant together with Mr Chadwick's report and photos and Mr Harrison's

marketing report and an email dated 8 April (284) recording lack of passing on information guides by the claimant to York and Malton drivers. The letter advised that the outcome may be a disciplinary warning but made no reference to the disciplinary procedure to be applied or to dismissal as a possible outcome.

5.37 On about 17 or 18 April 2019, it was discovered that bus 703's MOT was overdue. The claimant was shocked to find this was so, believing the MOT due in May. The bus was taken out of service at once.

5.38 On 23 April 2019 the claimant was subjected to a precautionary suspension, confirmed by letter dated 24 April 2019 (302-303). Mr Chadwick, the Fleet Engineer had by then discovered the absence of the MOT for bus 703. The reason for the precautionary relief from duties was stated as the need for an investigation of a situation bringing into question the claimant's conduct in the workplace, namely: "Gross negligence by allowing a vehicle to be used in service without a valid MOT certificate and potentially bringing the company into disrepute by your actions", which conduct might be considered as gross misconduct. The precautionary suspension was said to be in accordance with the respondent's disciplinary procedure (which was not identified) but was said not to indicate a finding of guilt or that a disciplinary sanction would necessarily follow. The disciplinary hearing due to take place on 25 April 2019 was postponed and the claimant was instead called to an investigation meeting with Mr Chadwick on 1 May 2019.

5.39 Then in late April after the claimant's suspension, the respondent also became aware of the presence of student A on his work experience. Mr Chadwick and Mr Pizzuti found the student working under a bus at York depot, but not wearing appropriate personal protective equipment. Mr Chadwick contacted the student's college and was provided with a copy of the college's documentation, in particular the Health and Safety Assessment Record sheet for the York Depot (295-303). No copy of a finalised internal Transdev risk assessment signed off by the claimant before the student's placement commenced was provided by the college.

5.40 Ian Chadwick then carried out further investigation. He did not provide a final report but the way his investigation developed was evidenced by pre-prepared questions he put in formal interviews which he recorded. He did not interview Steve Smith, the Group Health and Safety Manager. On 29 April 2019, he interviewed Peter Ball, Forward Allocator, about both the MOT and the student (304); Karl Spencer Lead driver/supervisor about the MOT (305), and Phil Akers, Engineering Supervisor about both the MOT and the student (306-7).

5.41 On 30 April 2019, the claimant was informed of the additional allegations in relation to Student A and the investigation meeting by Ian Chadwick with him was put back to 8 May 2019 (307-8).

5.42 On 8 May 2019 Ian Chadwick held an investigation meeting with the claimant. Frank Stanisauskis took notes and the claimant's full-time Trade Union Official, and TU Officer, Phil Bown, (310-328) (329-332). The client had been provided with copies of all Ian Chadwick's investigation interview notes thus far. During an extensive interview, the claimant accepted that as Transport Manager (Traffic

Manager) he had overall responsibility for the fleet and depot at both York and Malton.

5.42 He did not dispute that an error was made and that the MOT was missed. He pointed out that the vehicle had been transferred to Burnley. He couldn't say when he became aware the MOT had expired and explained that he was under the impression it was MOT'd until May. He said: "I ain't hiding anything I made a cock up" and accepted this was not in line with his obligations as a Transport Manager. He said he was prepared to write to the Traffic Commissioner to inform of the error and apologise. He said the plan was changed because the fleet changed so much with new buses brought in, so that dates had to be added. Bus 703 was missed off because it was transferred out of York, but he accepted the bus had been back at York for two months. He didn't know if the MOT expiry date was recorded on the service and inspection record.

5.43 In respect of student A, the claimant stated: "I received an application for day release through college. I asked Gordon if this was okay. He said I cannot see why not other depots done it. I called college for risk assessment and called Steve for a risk assessment. Eric Close felt it wasn't (safe) to have him in York. So sent to work in Malton". When asked if he recalled having a discussion with Steve Smith regarding this and what the outcome was, he replied: "There was no real discussion I told him I was taking him on and he sent the risk assessment". He was asked about Andy Senior and said: "He didn't think it was the right place to have him that's why I sent him to Malton after taking advice." The claimant said the student " …was on day release one to two days he was mainly watching, may have changed the odd bulb after being shown, never left to do anything on his own". He said the student was in York because he had a fallout with Darren (the Malton Engineering Supervisor) and only had two weeks to go. The student had been supplied with overalls and was just told to wear sensible footwear. He believed this student was working in a safe and controlled environment at Malton; it was quick turnaround at York and more controlled and safer (at Malton). He did not accept that he was advised by Steve Smith and Andy Senior not to progress with the appointment. When asked if he escalated the decision or just made it on his own, he replied that he spoke to Gordon Irvine. He felt the respondent had enough protection if something serious had happened to the student since the college would not have let him come if not; discussions took place and documents were produced. He did not accept he put the respondent's business at risk by appointing the student and reiterated that he had informed Gordon Irvine. He maintained that all the paperwork was in order and there had been discussions with the college and that there were emails to back him up for the risk assessment and the reasons why.

5.44 He sought to stress that the responsibility for MOT compliance should be a shared responsibility between an Engineering and the General Manager and felt that it would not been missed if he had had an Engineering Manager, it. He did not have time to check every MOT every week, the MOT should have been in the transfer papers.

5.45 On 9 May 2019, Ian Chadwick held an interview with Gordon Irvine who only vaguely recalled an initial conversation with the claimant and no follow up or further

conversation with him and felt no approval was given by him. He said a work experience placement could be approved for a short period with an appropriate risk assessment carried out, but he would not normally want minors in this type of environment. He said he would expect an internal company standard risk assessment carried out and the responsibility for having a minor in the workplace would rest with the employer not the college.

5.46 On 13 May 2019 Vitto Pizzuti wrote to the claimant notifying a disciplinary hearing to face 5 allegations, namely:

- gross negligence in relation to serious neglect of your duties by allowing a vehicle to be used in service without a valid MOT certificate
- gross negligence in relation to not following the advice of a health and safety professional around the welfare and protection of a vulnerable adult
- gross negligence and persistent poor performance in relation to the health and safety and cleanliness of the fleet and the Depot
- persistent poor performance in relation to handling customer complaints via social media
- serious failings in line with the Senior Traffic Commissioner's guidance on the role of a Transport Manager. (335-6)

The claimant was provided with a copy of his own interview notes and additions and Mr Chadwick's notes of the interview with Gordon Irvine. He was warned that the outcome could include a disciplinary sanction up to summary dismissal. There was no express reference to the disciplinary procedure.

5.47 The disciplinary hearing was brought forward to 22 May from 24 May 2019 (338-350). Andrew Douglas, by then Head of HR, accompanied Mr Pizzuti. As before, the claimant was accompanied by his full-time trade union official, Phil Bown. Mr Bown maintained the claimant had answered all questions in depth at the investigation meeting, with one confirmation being that of the MOT issues with the claimant confirming that he would report the omission to the Traffic Commissioner. The claimant said he held his hands up about the missed MOT but the bus was on loan from Burnley. He had been asked about it in the Business Review meeting and had said May; the bus had been in York then Burnley and then back to York. Mr Pizzuti put to him that it was in his 2018 plan and transferred out only for 6 weeks but the claimant maintained it was a permanent transfer which was why it was not on the 2019 plan. Mr Pizzuti said: "But you said it wasn't your bus, but it was and your team signed it off when it was in Burnley". The claimant explained that was a missed inspection report because it was away and, had he had an Engineering Manager, that manager would have checked; Phil Akers was only an acting supervisor but without training. There was discussion of the structure at York and the claimant contended that it was impossible to do a deep clean with only two cleaners and that he did not get permission from Mr Pizzuti and Mr Hornby to recruit; Mr Pizzuti disputed this. No outcome was given at the end of the disciplinary hearing.

5.48 On 30 May 2019, Mr Pizzuti wrote to the claimant summarily dismissing him with immediate effect for the first 2 charges of gross negligence in relation to

serious neglect of duties by allowing a vehicle to be used in service without a valid MOT and not following the advice of a health and safety professional around the welfare and protection of a "vulnerable adult" (351-8). Mr Pizzuti concluded that no company risk assessment for student A had been carried out and the claimant had no confirmation of approval by himself or any member of the executive committee for the student to be working within York or Malton. He felt the claimant could provide no explanation for this but had gone ahead anyway and signed the documentation for the placement to take place at York, although he then mitigated the risk and initially sent the student to the safer environment at Malton. Whilst his letter repeatedly referred to a "vulnerable adult" (even on one occasion a "venerable adult"), it also referred to the student as a 17-year old; the respondent was clearly approaching the question of risk to a young person and not to an adult.

5.49 In respect of these two serious charges, Mr Pizzuti referred to finding the claimant to have committed gross misconduct by virtue of gross negligence. By implication, he appeared to accept that the MOT failure was an oversight by the claimant whereas the health and safety failures in relation to the work experience student was more of a deliberate non-following of instructions. Mr Pizzuti also found the claimant negligent in relation to cleanliness at the Depot and buses at York and to have performed persistently poorly in relation to handling customer complaints via social media and that he had made serious failings in line with the Senior Transport Commissioner's guidance on the role of a Transport Manager for instance in requiring a visible up to date maintenance planner to be on display, all of which would have resulted in a written warning.

5.50 By letter dated 1 June 2019, the claimant appealed stating simply that the decision was excessive and in fact not the real reason for dismissal (359).

5.51 The first appeal was held on 20 June 2019 before Paul Turner, Commercial Director with Andrew Douglas, Head of HR, again in attendance (361-363). Mr Turner was not experienced at holding appeals and took advice throughout from Mr Douglas. Mr Bown again attended as the claimant's trade union representative. Mr Turner, based in Lancashire, only had occasional dealings with and was not in line management over the claimant; he had not been aware of any rumours concerning the claimant's likely dismissal. He opened the appeal by saying that its purpose was to hear the claimant's points of appeal set out in his appeal letter, in particular that the sanction of dismissal was too harsh. He approached his task only as a review of the decision to dismiss made by Mr Pizzuti.

5.52 However, the claimant was allowed to and did expand upon his grounds of appeal and stated that he was disappointed at Mr Turner's involvement since the appeal should be heard by a director (i.e. from the Executive Board). He maintained that there were glaring errors in the outcome and stuff had been left out. The respondent failed to acknowledge that he had no Engineering Manager at York and had no say on engineering matters. The vehicle was not a York bus, it was on loan from Burnley which was why it wasn't on his planner. It was false to say he had not sought advice about the apprentice on day release, he had spoken with Gordon and had a witness to that. He had never been given permission to get a cleaner in York; only his predecessor Alan Isherwood had received such approval. He had been treated differently regarding health and safety and the fact

that nobody was injured had been disregarded. At Malton, groundworks had been necessary but Vitto Pizzuti and Ian Chadwick stopped them and a member of staff then tripped and was seriously injured. The Claimant when asked confirmed that these were his grounds of appeal and did not expand upon the ground that the reasons in his dismissal letter were not the real reasons for his dismissal, nor did he refer back to the October and November meetings with Mr Horgan or suggest that his dismissal was long pre-determined.

5.53 Mr Turner adjourned saying that further investigation would be carried out before he gave his decision, which he said he hoped to put in writing by 28 June 2019. The claimant complained about the timescale, in terms of how long the disciplinary proceedings were taking. Mr Turner did look into the question of the Malton groundworks and contacted both Vitto Pizzuti and Ian Chadwick in respect of them. He received detailed replies from both and copy emails and documents from Mr Pizzutti (364-371). Whilst there was some dispute about whether the direction was to stop the groundworks entirely or to get another quote for less work, and about the date of the employee's accident (which Mr Pizzuti stated he understood to be in early October 2018 even before the proposed complete resurfacing was put on hold), the documentation by late October 2018 was copied in to Mr Hornby as well as Mr Irvine. The clear implication is that there was not just Executive Board approval but actually a board decision not to go ahead then with the complete works; there was clearly delay in making good the site, but no obvious basis for any disciplinary procedures against any manager or director involved.

5.54 Mr Turner's appeal outcome letter was sent on 28 June 2019, rejecting the claimant's appeal (374-377). It dealt mainly with the two main charges for which the claimant had been found guilty of gross negligence/gross misconduct and what it described as the claimant's points about errors of fact. As to management failing to admit there was no Engineering Manager and the claimant had no say, he set out that the previous Engineering Manager had not been a nominated Traffic Manager, so ultimate responsibility for compliance had been with him even when the Engineering Manager was there. Mr Turner concluded that 703 was at York for more than 14 days consecutively and York was responsible for its maintenance. A missed inspection report covering the inspection due in February was completed on 5 March 2019, which would not have been so if the bus had been transferred out. The bus was then returned to York on 28 February 2019 and operated for 29 days between 5 March 2019 and 17 April 2019, more than a 14-day non-use and was inspected again at York on 3 April 2019.

5.55 Mr Turner did not speak with Gordon Irvine but concluded from the evidence and interview statements that Mr Irvine had not given approval; he noted the claimant had not given any further evidence in relation to this aspect. On the cleanliness charge which resulted only in a written warning, Mr Turner concluded that any permission to recruit a cleaner granted to his predecessor would naturally transfer to the successor and that the claimant too would have permission, but there is no evidence that he questioned Mr Pizzuti. On the inconsistency of treatment in respect of health and safety matters, Mr Turner rejected the claimant's argument that Mr Pizzuti was responsible for the employee's accident but was not subjected to discipline himself. He acknowledged the claimant's lack of previous warnings on file, but concluded that Mr Pizzuti's decisions on all charges was

correct and upheld the sanction of summary dismissal for the first two charges. Mr Turner's letter notified a final stage of appeal was available to the claimant

5.56 On 1 July 2019, the claimant appealed giving his grounds of appeal that the sanction of dismissal was far too severe and the statements of Mr Pizzuti and Mr Chadwick were incorrect and designed to cover the truth (378).

5.57 On 2 July 2019, Mr Douglas wrote to the claimant fixing the second or final stage appeal hearing for 15 July 2019. His letter states: "This hearing is in accordance with the section of the company's disciplinary procedure for dealing with appeals". This was the first reference within the respondent's correspondence to the claimant to its disciplinary procedure since the precautionary suspension letter. In fact, there was no second stage of appeal provided for in the Yorkshire Coastliner Disciplinary & Grievance Procedure. However, the second stage of appeal was the result of local agreement with trade unions and was in place across most of the respondent's depots and subsidiaries; also the procedure set down was that appeals against dismissal and summary dismissal were to be taken to the Managing Director (Mr Hornby's position before he became Chief Executive Officer).

5.58 Thus a second and final stage of appeal was held before Mr Hornby on 15 July 2019, again with Mr Douglas attending and taking notes and Mr Bown accompanying and representing the claimant (380-383). In respect of the MOT, the claimant said he had held his hands up before the investigatory meeting in circumstances where the bus had been transferred to Burnley, had needed to go immediately and the papers were sent with it. The bus came off the MOT planner but came back to York because of the ADL contract. York didn't get the transfer papers and he didn't expect it to come back and need an MOT. He said: "Yes I missed it" but the sanction was way too harsh. On the health and safety aspect, the claimant said he had a witness to when he asked Gordon Irvine, who had approved the placement "as long as we do the necessary as we have done before". He felt he had been treated differently from the earlier incident yet nobody was injured. Nobody had asked about student A. The student had a fallout with Darren in Malton and had two weeks left so the claimant said he could come to York. He had been treated differently from Vitto Pizzuti and Ian Chadwick, who had cancelled the Malton works and an employee was injured but nothing happened to them. The claimant maintained he did not have permission to appoint another cleaner and the two cleaners did not have time to do the deep clean; he was told Mr Hornby would get back to him and nobody did but he couldn't appoint without approval. He said he took on the chin that maybe he did not give the priority to customer complaints that Mr Hornby wanted but there was nobody to do it.

5.59 Mr Hornby indicated that he wished to make further enquiries and that he would give the outcome in writing. He then spoke with Gordon Irvine who told him he would expect to see a risk assessment carried out before he would approve any appointment; he did not note the conversation. He did not speak with Steve Smith who by then had left the respondent. Mr Hornby did not consider it mitigation that the bus had not been involved in an accident whilst not MOT'd. Although he had the college risk assessment, Mr Hornby concluded that the claimant had not completed the company risk assessment paperwork sent to him by Steve Smith

and thus that the claimant did not have Mr Irvine's approval. He noted that the allegation against the claimant was for failing to follow the advice of health and safety professional (rather than specifically not having Mr Irvine's approval).

5.60 Mr Hornby sent his outcome letter on 17 July 2019 rejecting the appeal (384-8). He refuted a point made by the claimant in his appeal that bus 703 was required immediately and agreed with the approach of Mr Turner that 703 remained a York bus. He said he reviewed the evidence, whilst considering the potential consequences the MOT omission could have had on the business. Whilst he commended the claimant for admitting the omission, he stated that he could not accept or condone the level of negligence. In respect of the work experience student, he pointed out that the client had failed the appeal stages to produce a witness to his conversation with Gordon Irvine. In any event, the claimant made clear that Gordon's agreement was on the basis that the correct process and paperwork was completed but the claimant failed to complete the company risk assessment and, if the claimant was correct and Mr Irvine had approved the appointment, the correct paperwork and process was still not completed. Mr Hornby had reviewed the paperwork regarding the Malton groundwork resurfacing and found no evidence that Mr Pizzuti and Mr Chadwick had stopped the work being carried out; nor did he feel this was a relevant comparison to the claimant's health and safety default.

5.61 Despite each of them having long experience in the passenger transport field, none of the respondent's witnesses had come across a public service vehicle being put into service on the road without an MOT which would invalidate that vehicle's insurance cover.

6. The Tribunal had in mind its dual role when fact-finding in respect of the unfair dismissal claim, where it was particularly focussed upon the respondent's actions and decision-making, and the wrongful dismissal claim, where it had to determine itself whether the claimant was in repudiatory breach of contract. Although the fact-finding overlapped to a very great extent, the Tribunal made specific findings which were especially relevant the wrongful dismissal claim, at paragraphs 5.12 and 5.13 in respect of the claimant and Gordon Irvine, at 5.16 in respect of the claimant not completing an internal risk assessment and at 5.18 and 5.19 in respect of his unilateral decisions to switch the student to Malton and back to York again without further risk assessment.

7 The parties' submissions

7.1 The claimant contended that the respondent's purported reason for dismissal was not the real reason: the respondent's management had decided that he should exit the business because he was "old school" and did not fit the outlook it had for the business, which were not fair reasons. Its procedure was only superficially fair; the appeal hearings were derisory in duration, depth and seriousness with no real investigation of the issues despite the extent of its resources. It had struggled to produce the relevant disciplinary procedure and the written procedure did not deal with the second tier appeal which was agreed to be the local practice. There was no reference to gross negligence, only to gross misconduct with the closest

example causing an accident by negligence. There was no warning that gross negligence could result in dismissal and none of the respondent's witnesses could explain the concept, making it highly subjective.

7.2 He contended Basildon Academies v Amadi EAT 0343/14 was authority for the proposition that a failure to list certain types of behaviour as gross misconduct might mean an employer could not rely on that behaviour to dismiss summarily. Mr Pizzuti's evidence that the claimant himself put forward an early termination for £20,000 and that this was a "without prejudice" conversation with Mr Horgan could not be accepted; he was unreliable on this, which cast doubt more generally on his evidence. The October/November performance issues were clearly linked to the dismissal since the claimant faced allegations of gross negligence in relation to cleanliness and persistent poor performance in relation to social media which were expressly included in October, with an initial disciplinary hearing scheduled for April 2019 vacated as the MOT incident came to light.

7.3 It could be inferred that the respondent was searching for a reason to dismiss and the MOT and apprentice issues were trumped-up and a fig-leaf as reasons for a pre-determined dismissal. No comparable gross negligence dismissals were put forward by the respondent. The claimant relied heavily upon Mr French's email; it was too much of a coincidence that dismissal followed so closely after the claimant declined the settlement offer and argued with the global Head of HR. If Mr Hornby knew of the discussion before it took place, his credibility was damaged too.

7.4 Whilst missing the MOT for someone with a duty to ensure the fleet is maintained to the requisite standards was an omission, it did not afford reasonable grounds for summary dismissal. The respondent's witnesses found no mitigation in his case, ignoring his belief that the vehicle had been reassigned, that he lacked an engineering manager as most other depots had, that the the vehicle was only on the road for seven days without an MOT, that the engineers had inspected it prior to it going onto the road and that no accident had arisen, that the claimant was neither accused nor convicted of any criminal offence, that the regulator had not discovered the omission and that the respondent did not feel the need to communicate them to him. It fell outside the range of reasonable responses to ignore all these factors and concentrate on the claimant's omission.

7.5 Mr Turner's appeal was cursory with his review based on determining if there were errors of fact. Mr Irvine's vague recollection of events was seen as sufficient to override the claimant's own belief that he had received permission. Mr Hornby's definition of gross negligence as complete disregard and neglect of duty that someone is trained and qualified to do did not reflect any settled definition relied upon by Mr Pizzuti. These show wilfully poor investigations in support of a predetermined outcome to dismiss the claimant for any convenient reason when the real reason was the respondent's ulterior motive.

7.6 The claimant contended that the sanction of gross misconduct was outside the range of reasonable responses because the respondent's own policies did not envisage gross negligence as an example of gross misconduct; mitigation was ignored and there was marked reluctance to enquire into the claimant's case such as consideration of his witness (the apprentice's father) or the risk assessment he

did complete. As a matter of contractual interpretation, there was no repudiatory breach of contract justifying a summary dismissal.

7.7 The respondent contended the claimant was guilty of two repudiatory breaches of contract by virtue of gross misconduct, in respect of the wrongful dismissal claim. His conduct so undermined the trust and confidence inherent in the employment contract that the employer should no longer be required to retain him; his gross negligence was a really serious failure to achieve the standard of skill and care objectively expected in the light of his grade and experience.

7.8 As Yorkshire Coastliner's designated Transport Manager under the operator's licence for York and Malton, he was responsible for ensuring all vehicles were safe and passed the relevant statutory tests; this was central to his role as General Manager. From 9 to 17 April 2019, the 703 bus operated and carried fare-paying passengers without a valid MOT. Although he acknowledged this, he contended incorrectly that 703 was on loan from Burnley and thus missed off the planner. Ensuring buses had their MOT was the responsibility of the Transport Manager alone; this was a really serious failure to achieve the standard of skill and care and went to the root of his contract of employment.

7.9 On student A, the respondent pointed to the email on 21 June 2018 when Mr Smith Group H&S Manager sent the claimant a risk assessment template and asked to be informed of student A's start date so an induction could be arranged and the emails on 6 September 2018 from Andy Senior and Mr Smith. Mr Senior was not happy with the situation, Mr Smith said no risk assessment had been undertaken and Mr Senior then suggested the placement be put on the back burner till all parties are happy and "Steve Smith needs to be involved". There is no evidence the claimant followed this up with Mr Smith; it was simply not credible that he completed the risk assessment, sent it to the college and stored it on his company computer but failed to mention this at any stage internally and his witness statement. The college appeared to have sent all its relevant paperwork to Mr Chadwick; whilst the respondent accepts the claimant did complete the college risk assessment that did not replace its own risk assessment and only covered work experience at York when the student carried out most of his time at Malton. When discovered on site he was not wearing correct PPE. The claimant plainly failed to follow the H&S professional's advice, allowing a minor into a dangerous workplace without a proper risk assessment, a really serious failure to achieve the skill and care objectively expected of him. The categories of gross misconduct in the disciplinary procedure are non-exhaustive and the respondent was entitled to dismiss summarily for gross misconduct; the wrongful dismissal claim should be dismissed.

7.10 As to unfair dismissal, the respondent did dismiss the claimant for the reason of the MOT omission and failure to follow the advice of the H&S professional, a reason relating to conduct. Even if the Claimant's version of the November meeting with Mr Horgan was preferred to Mr Pizzuti's, no disciplinary proceedings were then commenced and Mr Pizzuti reassured him that he wanted to assist him get the depot back on track. Mr Horgan was not involved again and the disciplinary proceedings commenced in April 2019 relating to cleanliness of the depot/buses and social media activity resulted from separate investigations not connected with

Mr Horgan. The claimant did commit the acts of misconduct relied upon which were not "set-up", nor throughout the investigation, disciplinary and appeal hearings, did the claimant supported by his full-time trade union officer assert that it was a set-up.

7.11 As to reasonableness, did the respondent believe the claimant to be guilty of misconduct? The claimant had accepted that 703 was without an MOT and the respondent also concluded that he failed to provide a risk assessment for student, hold an induction with Mr Smith or enter further correspondence with Mr Smith after he was told about potential issues and that the placement would need to be placed on the back burner. It plainly had a genuine belief in the claimant's guilt. Did the respondent have reasonable grounds for believing him guilty of that misconduct? He had admitted the 703 omission and the lack of evidence of compliance with Mr Smith's advice and the relevant investigatory documents gave reasonable grounds for belief in his guilt. At the time it held that belief, it had carried out as much investigation as was reasonable; it and had disclosed all appropriate paperwork; it was clear to the claimant what he was being investigated for and he knew he could be dismissed. He was represented at all stages by the full-time trade union officer and matters were dealt with as expeditiously as possible with all relevant individuals interviewed. The documentation from Mr Smith spoke for itself. After the initial investigation meeting, the respondent spoke with Mr Irvine and, although the claimant is critical that his witness to this conversation was not interviewed, he never identified that witness internally. Even on the claimant's version, Mr Irvine's permission was contingent upon him following relevant health and safety protocols which were not followed. The failure to follow the H&S professional advice was gross negligence and thus gross misconduct.

7.11 The decision to dismiss the claimant for each of the acts of gross misconduct fell within the range of reasonable responses. The potential consequences of failing to comply with the relevant statutory guidance for Transport Managers are very serious and this responsibility was the claimant's alone irrespective of the absence of an Engineering Manager. The lack of engagement with Mr Smith and potential risk to the student made it well within the range of reasonable responses to dismiss for that conduct too. On the claimant's inconsistency argument, the respondent urged that Mr Pizzuti's actions did not amount to misconduct and the circumstances were not comparable; there was no suggestion he was led to believe some types of conduct would be overlooked because they had been condoned previously.

8 The Law

8.1 Unfair dismissal: The main statutory provisions are at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

> "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show - (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within sub-section (2) or some other substantial

> reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Then by sub-section (2):

> "A reason falls within this sub-section if it -... (b) relates to the conduct of the employee..."

Then by sub-section (4):

> "Where the employer has fulfilled the requirements of sub-section (1), 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 undertakings) 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."

8.2 In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold the genuine belief that the employee was guilty of an act (or acts) of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent but there is no burden either way under Section 98(4).

8.3 The Tribunal reminded itself that its role in respect of Section 98(4) was to focus upon what the respondent employer had done and concluded and not to substitute its own decision at each stage including the appeals stages and the ultimate sanction of dismissal and that it should stand back and take a broad view of the case in procedural and substantive terms. In many cases of conduct dismissals, it is appropriate to have regard to the “range of reasonable responses” open to a reasonable employer. Finally, the Tribunal also had regard to the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015).

8.4 Wrongful dismissal/breach of contract: The applicable law is at Section 3(2) of the Employment Tribunals Act 1996 and Articles 3 and 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order, 1994. The claimant’s case is that he was wrongfully dismissed in breach of his contractual notice provision by being summarily dismissed. In order to justify a summary dismissal, the employer has to show on the balance of probabilities that the employee concerned was guilty of gross misconduct or some other repudiatory breach of contract entitling it to dismiss without notice. The Tribunal therefore had to determine itself upon the claimant’s actions – was he guilty of gross misconduct or some other repudiatory breach of contract?

9 Conclusions

9.1 The Tribunal dealt first with the unfair dismissal claim, concluding that the respondent did prove its potentially fair reason for dismissal, which related to the conduct of the claimant. Contrary to the claimant's submissions that the real reason for dismissal was because the claimant was "old school" and did not fit the business, the respondent satisfied the burden of proof in establishing that its principal reason for dismissal was a reason relating to his conduct. There is no further definition or elaboration of "conduct" within Section 98(2) and the respondent showed that it dismissed the claimant for his behaviour or actions in respect of two matters, the operation of bus 703 without an MOT and his failure to follow the advice of the Health and Safety professional in respect of the work experience student; this was the real reason for dismissal. Indeed, this is consistent with the evidence from the claimant that neither the missing MOT nor the situation and lack of procedure in relation to the work experience student were part of a "set-up"; in oral evidence, he accepted that he believed these were what gave the respondent the opportunity to carry out what they had begun in October 2018 and said he considered that, had it been anyone else, the sanction of dismissal would not have been applied. The way the claimant put it was that it was not a complete "set-up" but a disregard of his mitigating circumstances.

9.2 In considering section 98 (4), the Tribunal found that the respondent was a major employer with extensive managerial and human resources to give to the investigation and the disciplinary proceedings; no particular tolerance is allowed such as would be afforded to a much smaller less well-resourced organisation. It was entirely satisfied that the respondent held a genuine belief in the claimant's guilt of causing bus 703 to be in service without an MOT and that he had disregarded the advice of the Health and Safety professional in respect of the work experience placement of student A. Although he sought to show mitigating circumstances, the claimant admitted the former and the respondent, initially Mr Pizzuti but then Mr Turner and Mr Hornby on appeal, concluded that he had disregarded the advice of Mr Smith. The latter conclusion was reasonable having regard to the documentary evidence and the absence on the claimant's part of a compelling version of events establishing that he had completed the company risk assessment on Mr Smith's template and then provided that assessment to both Mr Smith (which would have given Mr Smith the opportunity to arrange a formal induction for the student) and the college. The documentary evidence was telling in both what it contained and what it did not contain (such as any copy of a company risk assessment provided back to Mr Chadwick by the college in the course of his investigation in late April 2019).

9.3 Accordingly, the Tribunal concluded that the respondent had reasonable grounds upon which to sustain the belief about the claimant's conduct in respect to the work experience student's placement as well as the missing MOT. Turning to the final stage at which the employer formed that belief on those grounds, the Tribunal concluded on the balance of probabilities that the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances. Whilst the respondent's procedure was not perfect, the Tribunal found the respondent's investigation a reasonable and sufficient investigation. The Tribunal was generally impressed by the extent of Mr Chadwick's initial

investigation and his interview of the claimant, the product of which was fully shared with the claimant; there was an extensive disciplinary hearing before Mr Pizzuti at which the claimant had the full opportunity to answer the charges he faced (in particular the first two); although the two stages of appeal (affording an extra stage beyond that normally found in disciplinary procedures) were both by way of review rather than rehearing and resulted in short hearings, there is no suggestion that the claimant and his full-time trade union representative felt rushed or unable to present his case and both led to some further investigation by the appeals officers.

9.4 In general terms therefore, the respondent appeared to have adopted a reasonable procedure: investigatory and disciplinary meetings and their outcome were not unreasonably delayed; the claimant knew the case against him and had ample opportunity to put his case, being accompanied or represented throughout by the trade union full time officer; a number of different members of management were involved at different stages and the claimant had the right of two stages of appeal which he exercised. Of course, the procedure followed was by no means perfect or impossible to criticise. Even beyond the criticisms raised by the claimant in closing submissions, there were other defects: the respondent's correspondence repeatedly referred to "a vulnerable adult" when student A was still a minor aged 17 at the time of the claimant's disciplinary procedure; Mr Turner's appeal outcome referred to the claimant alleging errors of fact when the claimant was plainly arguing a much fuller case of unfairness; nobody, not even Mr Chadwick, put the emails of 21 June 2018 and 6 September 2018 to Mr Irvine to see if this helped him to remember more completely the discussion with the claimant about the work experience student. The Tribunal concluded that those emails were consistent with Mr Irvine giving conditional approval, subject to the correct health and safety procedures of company risk assessment and proper induction being implemented (which was substantially the claimant's version). A further criticism would be of "overloading" of the disciplinary proceedings, in the sense that the lesser matters which were to have been part of the disciplinary hearing which did not go ahead were still included alongside the very serious MOT and health and safety advice charges. Furthermore, the respondent made little reference to its own Disciplinary Procedure throughout the whole investigatory and process. The claimant correctly identified that gross negligence was not expressly included in the Disciplinary Procedure as an example of something which can give rise to summary dismissal. However, although many very specific examples of gross misconduct were set out in that procedure, the procedure expressly described this as a non-exhaustive list. The Tribunal considered that there would always be the possibility of other really serious acts of misconduct being committed which were not listed but which would also render the employee liable to summary dismissal.

9.5 The Tribunal concluded that much turned on the good or bad faith of the disciplinary and appeals managers, no bad faith being asserted by the claimant against the investigator, Mr Chadwick. In other words, was the claimant's dismissal a pre-determined outcome of the disciplinary and appeals hearings; did the managers latch on to a convenient error or couple of errors by the claimant to put into effect a long-desired termination and likewise did they deliberately ignore his mitigation of length of service, good disciplinary record, loan or transfer of bus 703 to Burnley, lack of engineering manager and Inexperienced engineering supervisor at York in order to enforce that dismissal? Alongside this, did those managers or

at least Mr Pizzuti and Mr Hornby set out to deceive the Tribunal about the background and course of events which led to the claimant's dismissal. Ultimately, the Tribunal concluded on the balance of probabilities that they had not done so notwithstanding its findings that Mr Pizzuti had played down the role of Mr Horgan and that Mr Pizzuti and Mr Hornby had continued to find fault with claimant's performance in early 2019. In April 2019 the claimant was to face a disciplinary hearing which could have resulted in a warning (short of dismissal) but they could not have foreseen or directed the course of events in respect of the missed MOT, even if the presence of the work experience student might have been discovered sooner.

9.6 The Tribunal noted that the claimant's inconsistency argument was not pursued in closing submissions and had not been dealt with in his witness statement. In any event, no significant inconsistency of treatment was established by him. The situation of the missed MOT was unique and the claimant's disregard of health and safety advice was not comparable with the business decision not to carry out the groundwork resurfacing at Malton, even if an accident to an employee followed. The Tribunal was not assisted by the claimant's reliance upon Amadi. At paragraph 19 of that decision, the EAT suggested that its conclusion was not necessarily one of general application but arose from the facts presented to the Employment Tribunal. The principle is that an employee owes no implied duty to report to his employer an allegation, however ill-founded, of impropriety made against him in the absence of an express term to do so; the Tribunal considered this had no bearing upon these proceedings.

9.7 The Tribunal was fully prepared to infer that the respondent's management gave less weight to the claimant's mitigation than they may have done had there been no concerns about the claimant's performance. However, it still needed to determine whether the decision to dismiss the claimant fell outside the range of reasonable responses open to a reasonable employee in all the circumstances. A harsh sanction is not necessarily unreasonable if it is a sanction which a reasonable employer could have imposed in all the circumstances. The Tribunal considered that although some employers acting reasonably would have decided not to dismiss the claimant in these circumstances in view of his points of mitigation, other employers still acting reasonably would definitely have decided upon dismissal. In the absence of it finding bad faith and pre-determination, the Tribunal did not consider the sanction of dismissal was outside the range of reasonable responses or too harsh a sanction having regard to the respondent's serious findings in respect of the claimant's MOT omission and disregard of the health and safety advice over student A when viewed in the context of the claimant's senior role within the business, as both Transport and General Manager. In the premises, the claimant was fairly dismissed and his unfair dismissal claim is dismissed.

9.8 As to the wrongful dismissal claim, the Tribunal found on the balance of probabilities that bus 703 was a York bus (as the respondent had done). As Transport Manager, it was the claimant's responsibility to ensure that it had a valid MOT and was legal to drive and operate with passengers on the road. Although clearly an unintended omission, having regard to this onerous responsibility his failure did amount to gross negligence and a repudiatory breach of his contract of

employment. In respect of student A, having considered the evidence fully, the Tribunal concluded that the claimant had taken matters into his own hands to a great extent. It did not accept that he had ever completed a Transdev company risk assessment template for student A before the start of the work experience at York; he then switched the student to Malton as a safer environment, before finally having the student return to York for the last period of his work experience because of a disagreement the student had with the Engineering Supervisor at Malton. There was no suggestion of a fresh risk assessment for Malton by the claimant or the college nor any evidence of a formal notification to the college of the change of location to Malton or back to York later. Regrettably, the Tribunal concluded that the claimant who had initially quite properly involved both Gordon Irvine, Engineering Director, and Steve Smith, Group Health and Safety Manager, in June 2018 subsequently did his own thing in relation to the work experience student. The tribunal concluded that this was gross misconduct or a repudiatory breach of contract in itself.

9.9 The claimant's wrongful dismissal/breach of contract claim turns upon the Tribunal's own determination in respect of the claimant's contract of employment. Having regard to the contractual terms at paragraph 5.4 and the Job Purpose at paragraph 5.6 above, the Tribunal found material breaches of the claimant's conditions of employment since he was contracted to ensure at all times the safe and efficient operation of all operations out of (York and Malton depots) whilst having due regard to all relevant legislation. As set out above, the Tribunal concluded the claimant was in repudiatory breach of contract on both the missed MOT and the disregard of the health and safety professional's advice. Taken together, the Tribunal was wholly satisfied the two matters did justify the respondent in its summary dismissal and the claimant's wrongful dismissal/breach of contract claim is dismissed.

Employment Judge Parkin

Date: 23 September 2020