EMPLOYMENT TRIBUNALS

Claimant: Mr Carlton Davis

Respondent: Metroline Travel Limited

Heard at: **Bury St Edmunds (CVP)** **On: 20 – 21 June 2021**

Before: **Employment Judge Laidler (sitting alone)**

Representation:

Claimant: Ms L Hudson, Counsel

Respondent: Ms C Nicolaou, Solicitor

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The ET1 in this matter was received on 11 December 2020. ACAS Early Conciliation took place between 12 October to 12 November 2020. Although the claimant had ticked the boxes claiming discrimination on the grounds of race, age and religion/belief no particulars had been given and it was confirmed at this hearing that no such claims are brought. The issues to this Tribunal whether the claimant was unfairly and wrongfully dismissed.

2. The tribunal heard evidence from the claimant and from Mr Bill Harvey on behalf of the respondent. It had a bundle of documents of approximately 180 pages to which some were added at this hearing. From the evidence heard the Tribunal finds the following facts.

The Facts

3. The claimant commenced employment on 6 June 2004 as a Running Shift Service Engineer. There is no dispute that this involves responsibility for the maintenance and safe running of the bus fleet and is safety critical. The

engineers work alone and incorrect advice or failure to diagnose a faulty bus could have fatal consequences.

4. The claimant's contract of employment signed on 4 February 2008 gave details of the respondent's grievance and disciplinary procedures. In relation to the disciplinary procedure it provided that: –

> "The company requires that their employees comply with certain standards of performance and behaviour in carrying out their work. Metroline has an established disciplinary procedure which enables the company to act fairly and consistently with staff should it become necessary to take disciplinary action. The disciplinary procedure is detailed in the employee handbook. The procedure does not form part of your contract of employment however you are expected to comply with the process."

5. The disciplinary procedure was seen in the bundle at page 36. At clause 2.15 it provided a non - exhaustive list of examples of gross misconduct including: –

> "Negligence – which causes loss, damage or injury that is unacceptable to the company or where the safety of other employees, passengers or other third parties is compromised..."

6. It is that clause that is relied upon by the respondent.

7. The contract and the policy also provide that in cases of such the respondent may dismiss without notice.

8. The claimant stated in evidence that he did not know there was a disciplinary policy butt the tribunal cannot accept that. The documents are quite clear;d the claimant belonged to a trade union and had been subject to disciplinary proceedings in 2012 when he was given a final written warning and advise that it formed part of the company's formal disciplinary procedure and would remain on his file for 12 months.

9. Drivers working for the respondent in London work closely with IBus controllers who are responsible for ensuring that buses run efficiently and to time. Drivers will generally call IBus to report a fault or an issue that may need to be passed onto an engineer for advice.

10. On 4 July 2020 (page 67) a driver submitted a report about the bus she had been driving the previous night. She reported that she had called IBus to report a fault on the bus and told them that when she applied the brakes a sign claim up on the dashboard indicating that the bus was skidding. It was raining at the time and the driver thought it must be that causing the issue. However, when she reached Hounslow garage and applied the brake the steering wheel and the whole bus shuddered. IBus had informed her they would check with the engineer and they checked with the claimant.

11. The initial comment that was sent back to the driver she said was that she must have been driving too fast and breaking too hard and that the bus could continue in service.

12. The driver queried how the engineer could diagnose without attending, why she had been asked to continue and why she had been accused of speeding. She was however not prepared to continue to drive the bus as she did

not think it was safe. IBus then explained that a tow truck would be ordered to take the bus back to the depot.

13. The driver stated she had raised the matters as she was concerned with the way the issue had been dealt with and that if she had not had 5 years experience and it had been a new driver that been told to continue driving they might have done so in dangerous circumstances.

14. On 6 July 2020 the claimant submitted his report (page 68). It is headed "defective brakes". In his witness statement at paragraph 13 he stated that "despite the passage of time, I completed this document to the best of my recollection". It was in fact only 3 days later and is a relevant contemporaneous document.

15. The claimant noted that he had received a call from IBus on 3 July and that the driver had reported a problem with the brakes. He went on "when the controller that outlined the problem I told him that from what he told me the driver must be travelling too fast so when breaking the brakes will lock-up. If the road is wet and the brakes is applied to hard the ABS System will show a sign on the dash with a wheel mark"

16. The controller then called back the claimant about 15 minutes later. The claimant recorded he was told that the driver could not drive the bus because the break was defective. The claimant then wrote in his report "I told the controller that I am not used to the 120 route so ask the driver to go to Northolt and I will meet him there". The claimant went on that the controller called back and stated that the driver said it was not safe to drive and that it was the brakes. The claimant then said he would call Sovereign the tow pickup service to attend. On the claimant's own contemporaneous documents there were therefore 3 calls with the IBus controller.

17. As a result of these reports the respondent decided to investigate (page 70). By a letter of 9 July 2020 Mr James Harvey, Engineering Manager wrote to the claimant inviting him to an investigatory meeting on 15 July to discuss the alleged misconduct of: –

17.1 Failing to safely deal with a potential safety critical defect on the bus

17.2 Failing to conduct himself in a manner expected

18. The claimant was sent with that letter: –

18.1 The 3 voice calls with IBus

18.2 The occurrence report of the driver

18.3 Vehicle defect card

18.4 The claimant's own report

19. The respondent's policy allows an employee to be accompanied to an investigatory meeting but the letter made clear that this was as an observer/notetaker and not to ask questions or address the meeting.

20. The claimant advised he would be accompanied by Martin Netscher his trade union representative.

21. At the investigation meeting the three calls were played. The claimant was asked by Mr Harvey as to why he did not attend to which he replied "I told the controller I do not know the route. I have not been shown the 120s before". The claimant explained he had an issue with the phone supplied by the respondent and that "I had to talk through the phone as could not hear it at my ear so I did not have all the information". The claimant maintained that "based on my experience and knowledge I believed it was an ABS issue and it was either a sensor was not working correctly on one side locking up, it wasn't an ABS warning it was a skidmark." In answer to the driver statement of how the claimant could diagnose without seeing the bus the claimant stated "I was trying to save mileage and wanted to try and see the bus at Northolt as I don't know the route". The claimant again stated he had a problem with the phone "as I could not hear properly".

22. In evidence to this Tribunal the claimant stated he had advised by James Harvey at least 20 times that there was a problem with his issued phone. He made no mention of those complaints at the investigatory hearing and the Tribunal does not find his evidence in that respect credible. If he had reported the phone that many times to Jonathan Harvey and he was now been questioned by that Mr Harvey and stating he could not hear on the phone this was a perfect opportunity to remind Mr Harvey how many times he had reported the problem to him. The Tribunal also accepts the evidence of Bill Harvey that there were other phones available and if the claimant had raised the phone issue he would have been given another phone.

23. The tribunal also has to accept the submissions made on behalf of the respondent that if the claimant, a very experienced engineer, believed there was any issue with the phone it was even more incumbent upon him to ensure he obtained all the correct information from the IBus controller which he could have done by going and speaking to them only a few minutes away. The claimant acknowledged before James Harvey that this did not cross his mind but that that was quote an error".

24. When pressed by James Harvey as to why he did not attend the bus the claimant stated that the "main reason" with that he did not know the 120 route. He would have attended if it had been on the 90 route. This confirms that the claimant knew he should have attended to examine the bus.

25. The claimant also accepted that he had told the controller to tell the driver to drive the bus to Northolt.

26. When the investigation hearing reconvened after a break the claimant was asked if he wanted to add or ask anything and he asked if the bus was defective when checked. James Harvey stated no defect had been found. The claimant again acknowledged he had made an error by not going over to IBus to find out

more information. James Harvey advised that he would be recommending the matter be put forward for disciplinary hearing based on what he had heard

27. The claimant was invited to a disciplinary hearing (page 76). He was advised it would be heard on 23 July 2020 by William Harvey, Engineering Manager. The claimant states he did not know at that point that he was James Harvey's father as he had only ever known him as Bill. He states that he asked James Harvey when this was confirmed and James Harvey stressed he would still get a fair hearing. No issue was raised about Bill Harvey dealing with the disciplinary hearing by the claimant or his trade union representative.

28. The Tribunal accepts the evidence of Bill Harvey that even though the respondent employs nearly 4000 around the country there are only approximately 7/8 engineering managers to deal with disciplinary hearings. The tribunal also saw in the bundle a case when Bill Harvey found no case to answer in another case which James had investigated

29. The letter advised that if the claimant was found to have committed gross misconduct he could be dismissed without notice. He was advised of his right to be accompanied. James Harvey provided his email address in the letter in case the claimant had any requests or required any further information prior to the hearing. That had also been provided in the invite to the investigation hearing but the claimant's evidence was once he read the time and place of the meeting he did not read any further. The letter stated that the investigation hearing notes and relevant documents were enclosed with it. No issue was taken by the claimant or his trade union representative with the investigation notes and they never put forward any of their own. In cross examination the claimant stated it would have been a rude assumption to have challenged the notes as "I respect him as my manager"

30. By letter of 17 July 2020 (page 81) the claimant provided his resignation to James Harvey effective that day. In cross examination the claimant was taken to an email of 23 July 2020 (at page 96). This was from James Harvey in response to an email from Bill Harvey stating that after he had given his decision at the disciplinary the claimant stated he had already resigned. James replied that the claimant had given him his resignation on the 17th but that he had encouraged him to consider it over the weekend after which the claimant had told him that he would go ahead with the disciplinary and James had 'destroyed his resignation'. The claimant explained in evidence that after speaking to James on the Friday 17th when he handed him the resignation James had told him that if he went to the hearing he could clear his name. 'He told me his dad was William Harvey. I said if your dad is going to be doing it I don't think I will be given a fair trial. He convinced me his dad is a fair person and I said I would think about it over the weekend and he said to come back to him. I came to him back on the Monday even though I was suspended. We met at the gate and discussed it again.' I accepted his dad would do a fair job and withdrew my resignation and then I then met up with my union representative to discuss it.

31. The claimant in cross examination stated that he did not believe he got a fair trial as Bill Harvey was comparing him to another employee called Ian (paragraph 37 of his witness statement) he was clear that it was not because James Harvey was Bill Harvey's son

32. The notes of the disciplinary hearing were seen at page 176. The claimant was represented by Martin Netscher the trade union representative who had accompanied him to the investigatory meeting. The claimant states that he was not allowed to say much but that is not what the notes record. Bill Harvey confirmed in evidence that he knew the union representative for that garage and that each garage had their own union representative. Mr Netscher he found to be a knowledgeable union representative. He has since resigned. He was looking to become a convener. Prior to the election he moved. Mr Harvey thought he would have got that position had he not done so. No issue was raised about Bill Harvey conducting the hearing.

33. All the three calls were played with the IBus controller and the claimant was asked for his version. He stated he would normally ask more questions and to reset. Asked why he had not done a reset this time he stated: – "to get the skid light off the – you have to reset because of the phone I'm not sure if I asked". He explained the phone was giving him problems. He did not say he had complained about this many times to James Harvey or Connor as he now alleges.

34. It was when the first call was replayed that the trade union representative asked Bill Harvey to remember that there was a dodgy phone so the claimant may not have heard the second bit about the shuddering. They then listened again to the second call and the claimant explained that when the IBus controller said there was a brake defect he knew "it needed to be taken seriously". He knew the bus had to be preserved, towed, sealed and checked to find the fault. Based on his experience however 9/10 times brake allegations never go that way. He knew he could 'swap a bus off safely and swap a bus over and drive it back'.

35. The claimant accepted he said to IBus that it was okay for the driver to drive the bus. Then the claimant seemed to go back on that and said he "was giving the opportunity to say it can't be moved". Again the claimant said it did not cross his mind to go and speak to IBus. His union representative confirmed that the claimant had admitted at the investigation that was an error on his part.

36. The claimant's trade union representative was given the opportunity to read out a statement. This was seen at page 63 of the bundle. The claimant told this tribunal he had never seen this before and that it had not been discussed with him. The tribunal does not find it credible that an experienced trade union representative would make a statement on behalf of a member without first discussing it with him even if he did not show him the written document.

37. In this statement Mr Netscher took issue with the word "potential" in the first allegation that the claimant had failed to safely deal with a "potential safety critical defect". He then mentioned the length of the claimant's experience and how he had to take decisions when IBus call him before going on to blame the driver of the bus, criticising her for driving to Hounslow the furthest part of the route and "for whatever reason decided to cost the company mileage and is now trying to cover up her false claims by questioning an engineer of such long-standing and the company is going along with it. She had lost 40+ miles and was trying to muddy the waters by questioning the decision the claimant had made".

38. After an adjournment Bill Harvey delivered his decision that he had found gross misconduct. The minutes record that he went through his findings. The Tribunal accepts that he read through this his summing up document which is in

the bundle. The data for that document was produced at the outset of this hearing which shows it was created on the day of the disciplinary hearing. The Tribunal accepts Bill Harvey's evidence that he read from it. In cross examination the claimant stated that Bill Harvey was going through some statement or comments. He acknowledged "maybe I was not paying attention. I apologise for that"

39. The summing up document was at page 166 of the bundle. Bill Harvey found no case to answer on the allegation that the claimant had "failed to conduct yourself in a manner expected" but did find a case to answer on the other charge. On the claimant's own admission he had not asked the correct questions to determine if the bus had a safety critical issue before giving a clear instruction to continue to drive the bus. The claimant had not demonstrated that he recognised the seriousness of his decision. He could not be confident that the claimant would not act in the same way in future. The claimant was very experienced and had an obligation to ask the correct questions. The respondent's operators' license could have been in jeopardy. The respondent had to ensure all buses in service were in good working order.

40. The claimant again offered his resignation which was not accepted as he had been dismissed.

41. The outcome letter was sent to the claimant and dated 29 July 2020. It provided the meeting notes and confirmed the decision to dismiss. The claimant was advised of his right of appeal within 7 calendar days of the date of the letter.

42. The respondent did not produce any evidence that the letter was actually sent on that date. The postage record does not suffice. Mr Harvey stated in evidence it would have gone by post and recorded delivery but the tribunal has received no evidence of that. The claimant has produced a handwritten envelope showing the date stamped as 23 October 2020 and a track and trace receipt showing it was delivered on 26 October 2020. That ties in with the claimant's evidence that he started chasing his union in September/October when he had not heard anything. The tribunal saw an email from Mary Summers who had taken over the claimant's case at the union dated 12 October 2020 stating the claimant had not received any documentation.

43. The Tribunal accepts that the claimant did not receive the letter into October. However he knew he had been dismissed, had been offered an appeal and no steps were taken by him or his union to pursue that and to explain that they had not been able to appeal in time as the disciplinary letter had not been received. The Tribunal accepts Bill Harvey's evidence that that the appeal would still have been considered in those circumstances.

Relevant law

44. The respondent relies on conduct a potentially fair reason for dismissal within section 98(2)(b) Employment Rights Act 1996. In considering such a dismissal the tribunal must have regard to the three-fold test laid down in British Home Stores Limited v Burchell [1978] IRLR 379:

> First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable

> grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. An employer who discharges the onus of demonstrating these three matters must not be examined further. It is not necessary that the Industrial Tribunal itself would have shared the same view in those circumstances. Nor should the Tribunal examine the quality of material which the employer had before him, for instance to see whether it was the sort of material which, objectively considered, would lead to a certain conclusion on a balance of probabilities, or whether it was the sort of material which would lead to the same conclusion beyond reasonable doubt.

45. If the employer satisfies the tribunal it had a potentially fair reason for dismissal then the tribunal must apply section 98(4) and determine whether the dismissal was fair or unfair and that:

> '(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'.

46. It is not for the tribunal to substitute its view for that of the employer but to determine whether dismissal was within the band of reasonable responses.

The tribunal's conclusions

47. The tribunal is satisfied that the respondent through James Harvey and Bill Harvey carried out a reasonable investigation in all the circumstances. What had been discussed with the claimant and IBus was recorded and those calls were listened to at all the hearings.

48. The Tribunal accepts the submissions of the respondent that it was not reasonable to investigate the phone issue further. Using the phone then was not going to prove one way or another what the claimant had or had not heard.

49. It was suggested by the claimant's counsel that the respondent should have investigated what training the claimant had on the route. This was a very experienced engineer whose job it was to go out and check buses. He made it clear he was not going to see the bus as he did not know the route. He took no steps to find out where the bus was on the route by checking with IBus which he could have easily done. He accepted that was a mistake. Despite that he told the driver to drive to Northolt.

50. The respondent did have a reasonable belief after reasonable investigation in the claimant's misconduct of telling the driver to still drive the bus without inspecting it and asking all the correct questions.

51. The dismissal was fair in all the circumstances. It is not for this tribunal to substitute its view for that of the employer. Dismissal was clearly within the band of reasonable responses with what was a safety critical incident. The claimant did not accept any responsibility or put forward any genuine mitigation. In fact his trade union representative tried to blame the driver. Bill Harvey had every reason to have concerns that the claimant might act the same way in the future. The

claimant was offered a right of appeal and despite the delay with receiving the letter did not seek to pursue that.

Breach of contract

52. The respondent was entitled in accordance with the contract and the disciplinary policy to treat this matter as a fundamental breach of contract entitling it to dismiss without notice. One of the examples given in the respondent's policy was negligence 'where the safety of other employees, passengers or other third parties is compromised'. That was clearly the case here. There was no breach of contract and that claim is also dismissed

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Employment Judge Laidler

Date: 28 August 2022

REASONS SENT TO THE PARTIES ON

03 October 2022

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J Moossavi

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FOR THE TRIBUNAL OFFICE