



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Samuel Moss

**Respondent:** (1) Trent Motor Traction Company Limited (trading as Trent Barton)  
(2) Mr Kurt Cappello

**Heard at:** Nottingham                      **On:** 5 September 2023

**Before:** Employment Judge Broughton (Sitting alone)

## Representatives

**Claimant:** Mr Green - counsel  
**Respondent:** Mr Feeny - counsel

# INTER RELIEF RESERVED JUDGMENT

The judgment of the Tribunal is that:

- The Claimant's application for interim relief is not upheld.
- No order is made for reinstatement, re-engagement or continuation of the contract of employment.

## REASONS

### Introduction

1. This hearing was listed for 3 hours to determine the Claimant's application for interim relief against the First Respondent, hereafter referred to as R1, and, if appropriate, to order the Claimant's reinstatement or reengagement or to grant a continuation of contract order pending the hearing of the complaint of unfair dismissal.

### Background

2. The claim was presented at the Tribunal on 15 August 2023 and included an application for interim relief.
3. The Claimant was employed as a PCV Driver from 13 July 2021 (his period of continuous service commenced on 6 April 2021) to drive buses for R1.
4. The Claimant's employment terminated on **8 August 2023**.
5. The Claimant is a member of UNITE the union. UNITE is recognised by R1 for the purposes of collective bargaining.

6. The Claimant pleads in the Particulars of Claim, that whilst conducting his regular activities the Claimant was frequently in contact with Aaron Irwin (Operations Manager) and that Mr Irwin's communications with the Claimant were curt, unhelpful and hostile. The Claimant does not make this same allegation against those directly involved in the disciplinary proceedings which led to his dismissal; Ms Pike- Smart (investigation), Mr Cappello (disciplinary) or Ms Sharon Bailey (appeal).
7. The Claimant complains in his Particulars of Claim that he had made three protected disclosures ;
  - 7.1 On **9 September 2022** that R1 breached section 13 Employment Rights Act 1996 (ERA) in respect of the pay of departing employees
  - 7.2 On **4 August 2023**, that the recording of the disciplinary investigation meeting amounted to a breach of GDPR.
  - 7.3 On **4 August 2023** that he was being victimised as a consequence of his trade union activities contrary to section 146 Trade Union and Labour Relations (Consolidation) Act 1991 (TULRCA).
8. The application for interim relief as set out in the Particulars of Claim, was presented on the basis of an automatic unfair dismissal under section 161 TULRCA, the reason for his dismissal pleaded as being because of his trade union activities or in the alternative, contrary to section 128 ERA on the basis that he had been automatically unfairly dismissed because he had made protected disclosures. There is an overlap in the factual nexus of the allegations and claims at paragraphs above at 8.1 and 8.3.
9. The Respondents have prepared draft grounds of resistance refuting the claims.

### **Evidence**

10. The Tribunal was assisted by a bundle of 186 documents. The Claimant produced a witness statement. The Tribunal is not at this hearing, making any findings of fact which will 'tie the hands' of the tribunal at the final hearing and therefore a request by the Claimant's counsel to have the Claimant swear to the truth of his witness statement, was refused. His statement however was considered as part of the documentation put before the Tribunal.
11. The parties each produced written skeleton arguments and made further oral submissions.
12. Counsel for the Claimant produced transcripts for two case authorities:

***Taplin v C Shippam Ltd 1978 ICR 1068, EAT***  
***London City Airport Ltd v Chacko 2013 IRLR 610, EAT.***

### **Legal Principles**

#### **Statutory Provisions**

13. The Claimant complains that he was dismissed in connection with trade union membership, activities or services contrary to section 152 Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**).
14. The relevant provisions of section 152 TULRCA provide as follows:

(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair **if the reason for it (or, if more than one, the principal reason)** was that the employee—

- (a) was, or proposed to become, a member of an independent trade union,
- (b) **had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,**
- (ba) had made use, or proposed to make use, of trade union services at an appropriate time,

...

(2A) In this section—

- (a) “trade union services” means services made available to the employee by an independent trade union by virtue of his membership of the union, and
- (b) references to an employee’s “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) Where the reason or one of the reasons for the dismissal was that an independent trade union (with or without the employee’s consent) raised a matter on behalf of the employee as one of its members, the reason shall be treated as falling within subsection (1)(ba). *Tribunal’s own stress*

### **Interim Relief**

15. Interim relief is available under TULRCA in respect of trade union dismissal cases.

16. Section 161 (1) TULRCA provides:

(1) *An employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 may apply to the tribunal for interim relief.*

(2) *The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).*

(3) *In a case where the employee relies on section 152(1)(a), (b) or (ba), or on section 152(1)(bb) otherwise than in relation to an offer made in contravention of section 145A(1)(d)] the tribunal shall not entertain an application for interim relief unless before the end of that period there is also so presented a certificate in writing signed by an authorised official of the independent trade union of which the employee was or proposed to become a member stating—*

(a) *that on the date of the dismissal the employee was or proposed to become a member of the union, and*

(b) *that there appear to be reasonable grounds for supposing that the reason for his dismissal (or, if more than one, the principal reason) was one alleged in the complaint.*

(4) *An “authorised official” means an official of the trade union authorised by it to act for the purposes of this section.*

(5) *A document purporting to be an authorisation of an official by a trade union to act for the purposes of this section and to be signed on behalf of the union shall be taken to be such an authorisation unless the contrary is proved; and a document purporting to be a certificate signed by such an official shall be taken to be signed by him unless the contrary is proved.*

17. Sections 163 TULCRA provides:

*(1) If on hearing an application for interim relief it appears to the tribunal **that it is likely that on determining the complaint** to which the application relates that it will find that, by virtue of section 152, the complainant has been unfairly dismissed, the following provisions apply.*

*(Tribunal stress)*

### **Case Law**

18. Once the employee has complied with the procedural hurdles to making an application for interim relief, the tribunal must go on to decide whether it is **likely** that he or she will succeed at a full hearing of the unfair dismissal complaint pursuant to section 163 (1) TULCRA.
19. The EAT in ***London City Airport Ltd v Chacko 2013 IRLR 610, EAT*** stated that this test requires the tribunal to carry out an '*expeditious summary assessment*' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This, it observed, necessarily involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at the full hearing.
20. The statutory test does not require the tribunal to make any findings of fact. ***Ryb v Nomura International plc ET Case No.3202174/09***: it must make a decision as to the likelihood of the Claimant's success at a full hearing of the unfair dismissal complaint based on the material before it, which will usually consist of the parties' pleadings, the witness statements and any other relevant documentary evidence. The basic task and function is to make 'a broad assessment on the material available to try to give the tribunal a feel and to make a prediction about what is likely to happen at the eventual hearing before a full tribunal'. This is so regardless of the volume or complexity of the material before it.
21. The EAT in ***Taplin v C Shippam Ltd 1978 ICR 1068, EAT*** expressly ruled out alternative tests such as a 'real possibility' or 'reasonable prospect' of success, or a 51 per cent or better chance of success. According to the EAT, the burden of proof in an interim relief application was intended to be greater than that at the full hearing, where the tribunal need only be satisfied on the 'balance of probabilities' that the Claimant has made out his or her case. This approach was endorsed in Chacko.
22. The EAT in ***British Home Stores Ltd v Burchell 1980 ICR 303, EAT***, set out a three-fold test in cases of unfair dismissal and misconduct cases in the context of claims of ordinary unfair dismissal brought pursuant to section 95 and 98 ERA. It is for the employer show that:
  - a. it believed the employee guilty of misconduct.
  - b. it had in mind reasonable grounds upon which to sustain that belief, and
  - c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

### **The issues**

23. The issues for the Tribunal to determine at this hearing are:

- a. Is it likely that on determining the Claimant's complaint, the tribunal will find that the Claimant was unfairly dismissed for the purposes of section 152 ?
- b. If so, what if any order should be made pending the Final Hearing (reinstatement, re-engagement, continuation of contract, or no order)?

## **Background**

### **Disciplinary Policy and Procedure**

24. Contained within the agreed bundle is a copy of R1's disciplinary policy. This sets out the offences which may give rise to immediate summary dismissal and are treated as gross misconduct (p.50). The list is not exhaustive. Separately there is a list of other offences classed as misconduct and which includes: *"failure to comply with company procedure"*.

25. The paragraph at the foot of the list of offences classed as **misconduct** (not gross misconduct), states;

*"such offences may lead to penalties up to and including summary dismissal dependent upon the circumstances, the employee's record, the level of the offence..."*

26. The disciplinary procedure (p.46) provides that ;

***"Formal disciplinary interviews can only be held after written notification is given and after the individual is given the opportunity to arrange trade union representation. Except in cases of gross misconduct, or when both parties agree to the contrary, 48 hours written notice of a disciplinary interview will be given."*** (Tribunal stress).

### **Lost Property Policy**

27. The policy set out in the notes (p.60) includes the following provisions:

*"You are expected to conduct a search [sic] the bus at the end of each journey for lost property by law, and its judged that any property left on the bus is the driver's legal responsibility . Lost property must be handed in as soon as possible and in any case within 24 hours, to your manager or Lead Driver.*

*If it's not possible to hand in the items, complete a lost property slip and put it in the night safe or other designated place..."*

*"If you have lost property on any of the company's premises you should report this to your manager as soon as possible please..."*

## **Background**

28. On the 18 July 2023 the Claimant was carrying out his normal duties as a bus driver. A passenger approached him with an umbrella and made enquiries about lost property. The Claimant's interaction with the passenger is recorded on CCTV footage with audio. The still photographs from that footage along with the notes R1 made of what was said, are set out in the bundle (p.67 – 70).

29. The notes setting out what R1 states was shown on the CCTV record that the umbrella was left on the seat behind the Claimant by a customer. Another passenger was seen on the CCTV footage showing the Claimant the umbrella and then places it on the luggage rack. The Claimant is noted as saying to this

passenger: *"yeah leave it on there, I'll sort that in a minute"*. That customer then left the bus. Another passenger approaches the Claimant, she is recorded on the documents as being heard on the CCTV footage asking the Claimant what happens to lost property and the Claimant responding:

*"Lost property ? You hand it in and then ... it all goes to erm... so you could pinch it and I could not see it"* .

30. At this point the customer leaves the bus with the umbrella. The Claimant is noted as remarking: *"There we go"*.

31. R1's case is that another passenger on the bus sent an email on 19 July 2023 to R1, a copy of which is in the bundle (p. 34). This passenger complains about an incident the day before, (which R1 identified as Claimant's bus driven by the Claimant), where the driver drove past their stop and spoke to them abruptly. They also complain that a woman enquired about a bag and umbrella left on the bus and the driver remarked: *"I'll pretend I won't see it"*.

32. Following receipt of that email there is a document dated 26 July 2023 (p.32) recording it appears, a conversation with the Claimant and Ms Laura Pike- Smart (Service Delivery Manager). The notes refer to R1 informing the Claimant that they had received a serious complaint from a customer regarding lost property, that the Claimant was being suspended with full pay and is asked if he is available to attend an interview about it on 27 July 2023.

33. It appears from the documents that the Claimant's union representative asked for a copy of the passenger complaint and a redacted copy (removing the passengers personal details) appears from the documents to have been provided on 27 July 2023 (p.34)

34. According to the documents, the investigation interview took place on 28 July 2023. The Claimant was accompanied by union representative, Scott Lennon (p.35).

35. Notes of the meeting record the Claimant informing Ms Pike-Smart that he could recall a woman asking about an umbrella, she asked what happened with lost property and he remembered saying *"something like they go to lost property into a box, most times end up sitting there"*. (p.35)

36. The notes go on to record;

*"SM said that the woman said well I might as well keep it then. SM said he didn't stop her because he didn't want to get into a confrontation "* .

37. The notes record the CCTV being watched during the hearing by the Claimant and his companion. Ms Pike-Smart is recorded as noting, after watching the CCTV footage, that the Claimant had apologised to the passenger for missing the passenger's stop and he was not abrupt . It was also clear that there was no bag, only an umbrella. However, Ms Pike-Smart asks the Claimant about what he had said to the passenger following which she is seen to have taken the umbrella off the bus:

*"SM [Claimant]] said that its only looking back on it now that SM realises that umbrella wasn't hers and its someone else's last property. SM said he thought it was just an enquiry as to what happens with lost property."*

and;

*"SDM [Ms Pike- Smart] asked SM is that's [sic] why he said would turn a blind eye*

*to allowing the lady to take the umbrella? SM said I didn't say I would turn a blind eye. SM said in general with lost property we may not see it and **people could pinch it.**" Tribunal stress*

38. The notes record the Claimant being told by Ms Pike- Smart that this was a serious complaint about lost property alleged to have been given away.
39. The Claimant was told that Aaron Irwin was on holiday and therefore Kurt Cappello (another Operations Manager) would review the case.

### **Disciplinary**

40. It is not in dispute that the Claimant was sent a letter dated 1 August 2023 (p.52) inviting him to disciplinary meeting on 1 August. The notes of the disciplinary hearing are however dated 4 August 2023. R1 in its draft response paragraph 45, asserts that there was a typographical error in the letter and that it should have stated that the meeting was on the 4<sup>th</sup> not the 1<sup>st</sup> August. The document indicate that the meeting did in fact take place on 4<sup>th</sup> August.
41. The letter includes the following:

*"Failure to follow company procedure.  
which may constitute gross misconduct...*

*Summary dismissal  
You will of course be given opportunity to provide an explanation and give details of any mitigating circumstances"...*
42. The disciplinary hearing notes dated 4 August 2023 record Mr Lennon attending as a full-time officer of UNITE as the Claimant's companion.
43. The notes do not record and the Claimant's witness statement does not state, that there was a request for further time to prepare and for an adjournment of the disciplinary hearing.
44. The notes state: *"OM stated that today's today was SM's rostered rest day which had **mutually agreed** to come in for ..."* (p.53) (Tribunal stress)
45. The Claimant is recorded in the notes as stating that he understands the missing property procedure.
46. The notes record the Claimant stating that he was running late at the end of his shift on the day of the incident and forgot all about the umbrella and thus did not report it at the end of his shift.
47. The notes also recall him explaining that his comment when the lady got off the bus with the umbrella of: *"here we go then"*, was a form of greeting or acknowledgement and was not to inform someone to take something (p58).
48. The notes record when asked why he had used the words; *"If you were to pinch it, I wouldn't know"*, that the Claimant stated that he did not fully understand what the customer was asking and could not recall using those exact words (p. 56).
49. Mr Lennon in the notes is recorded as stating that the Claimant was being victimised because he is a shop steward but he does not go on, according to the notes, to disclose information to Mr Cappello about exactly what activities he had been involved with which the Claimant now relies on as the reason for the dismissal .The notes also record Mr Lennon referring to an incident with 'ear pods' and that

the drivers involved in that incident were not suspended (p.56).

50. Mr Cappello is recorded in the notes as stating that with regards to previous lost property cases, those were to do with the disposal of property and that in the Claimant's case he is considering whether the Claimant had actively encouraged theft, rather than accidental disposal.
51. The notes record Mr Cappello concluding that the Claimant was fully aware of his obligation with regard to lost property and failed to carry out that obligation which is an act of misconduct. Further, he believes the Claimant did not report the incident because he was aware that he had actively encouraged a customer to take something from the vehicle which did not belong to them (p.60/61).
52. There is a letter of dismissal dated 8 August 2023 (p. 62) which states:  
*"Failure to follow company procedure which is covered by the staff handbook and represents your failure to meet the required standards of conduct expected of you. Which constitutes gross misconduct".*
53. The Claimant registers an appeal and that is heard by Sharon Bailey, Head of Operations.
54. The notes produced of the appeal hearing, record the Claimant at the appeal raising that he felt he had been subject to a detriment because of his trade union activities. The appeal is rejected.
55. Ms Bailey is recorded in this document as commenting on what she saw on the CCTV footage (p.71) including that the Claimant had laughed after he had said: "*There you go*" ( as the passenger left the bus with the umbrella).
56. The document presented as the notes of the appeal hearing also record Ms Bailey commenting on the alleged inconsistency in approach with one specific complaint mentioned during the disciplinary and appeal process and refers to these two complaints being of a completely different nature .
57. Ms Bailey is recorded in that document as upholding the decision of summary dismissal and refers to the Claimant as committing a dishonest act.
58. The Claimant has produced a witness statement in which he states he was the only trade union representative dealing with disciplinary matters and identifies a number of incidents or activities which led to animosity;
  - a. An incident not long after he was appointed as a representative in **April 2022**, he was trying to negotiate overtime payments. He put up a notice in designated notice points and was told to take them down by **Aaron Irwin**. Mr Irwin instructed drivers to remove them because they were not on official UNITE paper but when he reprinted them on UNITE paper they were still taken down (w/s para 5 and page 82)
  - b. Agreement could not be reached on **9 April 2022** and he sent an email to R1 informing it that there been a failure to agree and there was now a trade dispute. R1 did not reply (w/s para 6 doc 81) . There is a document in the bundle from the Claimant on 9 April 2022 to **Aaron Irwin** about the failure to agree.
  - c. On **17 June 2022**,the Claimant reported a defect on a vehicle (p.90) and the statement records that he spoke to Mr Lennon who sent an email to Jeff Council (MD) and Sharon Bailey Head of Operations. He alleges **Aaron Irwin** called him in after this and said he was not happy because it



showed no action was taken all day when the defect had been reported (w/s para 7).

- d. On the **9th and 10<sup>th</sup> of September 2022** he raised a complaint about R1 not paying departing employees their final pay in a timely manner. Within the witness statement the Claimant complains that on 10 September **Aaron Irwin** emailed him to say it was not the Claimant's place to answer questions regarding anyone's pay (w/s para 8 document 91- 95)
- e. On **14 June 2023** Claimant had a meeting with Mr Irwin and Darren Sharma about defects and vehicles and during this meeting **Mr Irwin** said he did not understand the way the Claimant worked by this he meant the Claimant always wanted to communicate in writing and refused to have phone conversations with Mr Irwin
- f. R1 created a social media application for the drivers called 'Blink' launched in **June 2023** and within the first three days the Claimant was told by **Aaron Irwin** that his profile picture was not appropriate and in another message Mr Irwin said the Claimant should not be answering questions people posted and that he had upset Mr Sharma with his comments (w/s para 11 pages 823- 84). The statement also starts that he told by Mr John Bickerton ( Engineering Director) to mind is tone and be more respectful when using Blink when commenting on defects and vehicles and when complaining that things are not getting done timely manner.
- g. The witness statement asserts that the Claimant put a post on Blink and asked twice that rather than R1 blame drivers for services not running, can R1 say it was due to 'operational difficulties' and that he had no response .It asserts that the managing director responded insinuating that his comments about having had no response were not truthful (w/s para 13) . The document at page 89 appears to be the response from the MD where he asserts that on each occasion when this has been raised with the leadership team it has been responded to and that the Claimant's post suggesting otherwise is 'simply not true'. The witness statement also refers to this being discussed at a JMC meeting which became a little heated (w/s para 14)
- h. The witness statement refers to union representatives not given time to collate surveys around pay negotiations in **July 2023** ( w/s para 15)
- i. The Claimant in the statement refers to attending two disciplinary hearings in around June 2023 where a customer had left an Apple Air Pod case on the bus, the first driver did not hand it in and the next driver threw it away and neither were suspended or dismissed. (w/s para 16)

## **Submissions**

### **Claimant's submissions**

59. Mr Green explained at the start of his submissions that while it is not the Claimant's intention to withdraw the allegation that the sole or principal reason for the termination of his employment was for reasons connected with the making of the pleaded protected disclosures contrary to section 103A ERA or reasons connected with the assertion of a statutory right contrary to section 104 ERA, he was only going to deal in this application with what he described as the 'meat of the issue', the most weighty matter, namely the trade activities. The Tribunal was invited by counsel not to address in dealing with this application, the alternative ground as set out in the written interim relief application, that the dismissal was because of the protected disclosures. The Respondent raised no objection and the Tribunal

therefore limited its consideration and findings to section 161 (1) TULCRA.

60. It is submitted that the discussions the Claimant had with Mr Irwin in connection with his trade union activities, were largely oral because this was Mr Irwin's preference. The Claimant was heavily involved in trade union activities. He was a senior UNITE representative in the workplace.
61. It is submitted that there is good reason to conclude before the disciplinary process, that R1 had formed a negative view of the Claimant, there had been some 'run ins' with R1 because the Claimant was generally raising issues. He was well-known to the R1 as someone who raised problems.
62. It is submitted that it must be taken into account that in terms of the incident which led to his summary dismissal, the umbrella was a small and inexpensive item. This did not form a pattern of such behaviour. This was not an item of property claimed by the public. There was no indication it was pre-meditated. Putting R1's case against him at the highest, it is submitted that the Claimant was approached by a member of the public and he did not say directly to take the umbrella but at its highest the passenger insinuated something about taking it and the Claimant acquiesced.
63. While the test which applies to automatic unfair dismissal is not whether the dismissal fell within the band of reasonable response, it is submitted that applying the Burchell test, to treat this as misconduct, would not be in a band of reasonable responses and inferences should therefore be drawn from this, that there is likely to be another reason behind the dismissal than the allegation of misconduct.
64. It is submitted that this offence does not reach the level of gross misconduct.
65. Further, a breach of company procedure is identified in the disciplinary letter, as misconduct, not a gross misconduct offence.
66. The '*pointed end*' of what the Claimant did, it is submitted was an act of dishonesty, inciting a passenger to take property however an allegation of dishonesty was not put to him until the disciplinary hearing. He was not alleged to have acted dishonestly in the investigation meeting or in the letter calling him to the disciplinary hearing.
67. It is submitted that the allegation against him was 'threadbare' and bolstered by an allegation of dishonesty. The allegation against him was weak in terms of it constituting gross misconduct and the Tribunal should ask itself what the real reason was.
68. Counsel referred to the case of Chacko and submits that also in the Claimant's case there was a history of engagement by the Claimant with R1 in relation to regulated trade union activities .
69. Counsel also submits that there was inordinate speed with which the disciplinary proceedings proceeded. The incident of misconduct took place on 26 July and the Claimant was dismissed by 8 August.
70. The investigation meeting took place on 28 July however it is submitted that had R1 proceeded as it intended to, the meeting would have taken place on 27 July. Further, Ms Pike- Smart does not say it is an offence of gross misconduct and therefore there should have been 48 hours' notice of the investigation meeting. As it happened the investigation meeting took place 48 hours later but it had been proposed initially by Ms Pike-Smart to proceed the next day.
71. It is submitted that the investigation meeting was on Friday the 28<sup>th</sup> July and the

report was produced one working day later on the following Monday.

72. The disciplinary meeting was on the 1<sup>st</sup> August, the same day as the letter of invitation however counsel accepts that this could have been a typographical error. However, he submits that the proceedings took place at 'breakneck' speed in stark contrast to evidence of how long other disciplinary processes took.
73. Counsel submits that the most similar case to the Claimant's, was a driver charged with misconduct on 4<sup>th</sup> May and it took one month before he was dismissed (para 23 (a)).
74. Counsel accepts that there is no document setting out any request by the Claimant for more time to respond to the allegations and he was an experienced trade union representative who had been involved in disciplinary matters and also had a trade union representative as his companion.

### **Comparators**

75. Counsel submits that a comparator is an employee of R1 who removed a £20 banknote from a purse in lost property (p101), he was caught on CCTV and initially lied about taking it.
76. Council concedes however, that the documents show that this employee was initially dismissed (p.108) and that it was Mr Cappello who made the decision to dismiss for gross misconduct (p.104). The dismissal was changed on appeal by Sharon Bailey
77. Counsel was invited by the Tribunal to clarify, in terms of motive and causation, who it was being alleged did what during the disciplinary process because of the Claimant's trade union membership. He submits that :

*"Inevitably it is difficult for the Claimant to say because it could be a secret reason and if it is, who gave the instruction and who carried it out is also secret. He had run-ins with Mr Sharman and Mr Irwin, disclosure for the final hearing would be sought against various other managers. Mr Sharman and Mr Irwin had dealings with the Claimant in the case of trade union activities. Mr Cappello carried out the disciplinary. Mr Cappello dismissed other drivers, however management act in concert".*

78. In response to a request from the Tribunal for further clarity on the Claimant's case about who it is alleged within the management team was acting in 'concert' given there are various stages to the process i.e. the investigation, disciplinary and appeal, counsel further submitted that:

*"Mr Cappello must have been aware of the attitude of other management towards the Claimant and the activities undertaken, as operations manager. I cannot safely go further than that. Inferences can be drawn from the overall picture, what the Claimant did on behalf of the trade union, the umbrella incident and what the respondent normally does".*

79. Counsel did not positively assert that there were any documents which suggest that Mr Cappello knew about the Claimant's trade union activities or any alleged negative view of him. It is not positively asserted that Mr Cappello was instructed by any specific person such as Mr Irwin to dismiss.
80. Counsel went on to submit that this may be the 'archetypal smokeless room', in that Mr Cappello and Mr Irwin decided what would happen or at the other end of the spectrum, Mr Capella knew the Claimant's card was 'marked' and R1 would

be happy if he was dismissed, "or it could be something in between". Counsel does not positively assert which but relies it appears on inferences to be drawn.

81. Counsel referred to the case of the driver who had not handed in and the driver who disposed of, an Apple Air pod case left on the bus, this should have been handed in and was in breach of the lost property policy but he was not dismissed. Counsel however accepted that the documents appeared to show that Ms Pike-Smart and not Mr Coppella issued the warning on that occasion (p.164). Counsel also does not allege that that case involved issues of dishonesty.
82. It remained unclear from counsel's submissions, who it was being alleged was motivated by the trade union activities, he had referred to management acting in concert but had gone on to submit that there may be a 'smokeless' room involving only Mr Irwin and Mr Cappello and yet there were other actors involved; Ms Pike-Smart at the investigation stage, as well as Ms Bailey at the appeal stage, and criticisms were being made of each stage of the process. Counsel was again asked to clarify the Claimant's case. Counsel in response submitted that Mr Cappello had the motive in dismissing, he must have shared the motive of Mr Irwin or been instructed or understood explicitly he should do so or various shades of that, hence Mr Cappello must have been party to the prohibited motive. Counsel submits that he could not go beyond that position in his submissions and say who told him, where and when. Counsel did not therefore explicitly submit that the Claimant's case is that the prohibited motive extended to Ms Pike-Smart and Ms Bailey.
83. It is submitted that drawing all the legitimate interference, the threshold is met.

#### **Respondent's submissions**

84. Counsel for the Respondent submits that there are certain alleged trade union activities where it is less than clear whether they are actually activities related to the trade union.
85. Counsel refers for example to the activities set out in the witness statement paragraph 11; namely that R1 created the social media application called Blink and within the first three days the Claimant complains that he was told by Mr Irwin that his profile picture was not appropriate because it showed a bus on a tow truck. He submits that it is not clear why this related to trade union activities. Likewise the comment about posts the Claimant had made which upset Mr Sharman.
86. Counsel submits that it is not clear that the Claimant would be posting on Blink in his trade union capacity rather than personal.
87. There is a document (p.118) of a Facebook message which appears to show that Aaron Irwin spoke to the Claimant about a comment to a customer which the customer referred to as being rude. Counsel submits there will have to be some examination by the tribunal at the final hearing about how much of the alleged behaviours which the Claimant says created some animosity toward him, related to trade union activities.
88. The thrust however of the respondent's submissions is on the issue of causation and motive.
89. Counsel referred to the case of Chacko where the claimant in Chacko was an active vigorous trade union representative who initiated a number of grievances. One of the supervisors made a statement to the employer that he was being bullied by Mr Chacko. On 10 August 2012 Mr Chacko's trade union wrote to the employers indicating that Mr Chacko was to be one of a number of employees involved with a ballot recognition of the trade union at the employers workplace. On 13 August 2012 Mr Chacko was told that he was suspended pending investigation into

complaints received in relation to his alleged conduct. He was subsequently dismissed. He brought an application for interim relief pursuant to section 161 TULRCA and the application was granted.

90. Against the background of the documentary evidence and submissions the employment judge in Chacko had stated that with that there were three factors he had particularly been concerned with; these were timing, consistency of approach and consistency of sanction;

*“17: First, he considered the context of timing. He noted the suspension of Mr Chacko had followed swiftly after the receipt of the unions notification Mr Chacko would be involved in the process of balloting for trade union recognition. Ultimately, he was not persuaded the issue on timing was more than a coincidence.*

*18. He then dealt with the other two factors. The first he described as of consistency of approach. As his written reasons explain, what he was addressing was the expedition with which the employers had conducted the disciplinary investigation and procedures culminating in his dismissal. To the employment judges mind, there had been a much less prompt response to Mr Chacko’s own grievances. He concluded at paragraph 11 that ‘it is this difference in speed which combined with the ultimate sanction imposed is most startling’.*

91. Counsel submits that the issue of timing, a factor in Chacko is not present case in this case. It is submitted that the Claimant cannot show that R1 was hostile because of his trade union activities generally. UNITE has been recognised by R1 for 30 years. The Claimant here unlike Chacko, relies on personal animosity towards him, possibly link to trade union activities but it is weaker than was present in Chacko.
92. it is submitted that in this case what is notable is that the misconduct is a matter of record, it was recorded on CCTV footage. The Claimant watched the CCTV in meetings and accepted what it shows.
93. When looking at whether it was gross from R1’s point of view, we must not conflate the issue with the reasonableness of belief. Motive is informed by whether R1 could reasonably see it as a dismissible offence. The initial impression of the passengers who complained, was that the Claimant was encouraging another passenger to take property that did not belong to her, therefore it is submitted that it is not plausible for the Claimant to say that it was incredible to believe that this is what he had been doing, because witnesses were of that view.
94. Counsel also submits that in term of the reasonableness of R1 in forming a belief that it was gross misconduct, the investigation on the 28<sup>th</sup> July 2023 (p.43) records that the Claimant said: *“SM said that it it’s only looking back on it that SM realises that umbrella wasn’t hers and its someone else property. SM said he thought it was just an enquiry as to what happens”* but counsel submits that the CCTV shows that within the space of eight minutes the umbrella had been handed in as lost property and then another passenger had enquired about it and the Claimant’s case is that he had forgotten that the umbrella had been handed in as lost property.
95. Counsel submits that from the words used; *“you can pinch it”*, it was reasonable to believe he was referring to the umbrella she was holding.
96. It is submitted that the evidence the Claimant gave during the investigation and disciplinary process was not credible. He stated *“there we go”* was *“a greeting”* but this was not credible because he made this comment as a passenger was getting off. Further, it is submitted that the documents show that the Claimant laughed to himself and that it was reasonable to form a view that the Claimant was encouraging the passenger to take the umbrella.

97. During the disciplinary investigation (p.56) he is also recorded as saying that he did not understand what the customer was asking and referred to having a problem with his left ear, something the notes do not record him mentioning during the investigation interview.
98. The Claimant is also recorded as saying that he did not report the umbrella at the depot after his shift, as lost property because he did not remember it being taken (p.58). However, during the investigation he had said that it was only looking back now that he realises that the umbrella was not the passengers (P.35). It is submitted that those explanations as recorded in the documents, are not consistent.
99. It is submitted that Mr Cappello had objective evidence from the CCTV of the misconduct and that there were a number of inconsistencies in the Claimant's own account during the disciplinary and investigation process. While whether R1 had reasonable grounds to believe that misconduct had been committed is not directly relevant, it is relevant whether Mr Cappello had reasonable grounds for believing that the matter was gross misconduct in determining the prospects of the Claimant establishing that this reason was not genuine and whether it is appropriate to draw inferences.
100. Further, Mr Cappello was not the Claimant's immediate line manager. The Claimant would have to prove at the final hearing that Mr Cappello was influenced by management or an individual manager. In the Chacko case it is submitted that the Claimant could establish that the manager knew what he had been up to.
101. It is submitted that counsel for the Claimant had difficulty articulating how the Claimant would put his case at trial because there is no evidence the Claimant can rely on to show Mr Capello was influenced other than by drawing an inference. Counsel submits that the Claimant's case that Mr Cappello was acting under the influence of others is mere speculation. Counsel for the Claimant asserts that in due course there will be disclosure, this may support the Claimant's case but it may not.
102. Mr Cappello was brought in because Mr Irwin was on holiday, it is submitted that if for example it was shown Mr Irwin was not on holiday, which may look 'fishy', but that is not what the Claimant is alleging.

### **Comparators**

103. Counsel submits that very little or no assistance can be drawn from the actions of the managers when considering the motive of the actors involved in this cases.
104. Ms Bailey was involved in the appeal, the reasonableness of the decision to dismiss is relevant not to the fairness of the decision to dismiss but to the overall process.
105. Counsel submits that the Tribunal should place reliance on Mr Capello having acted in the same way in a similar case (the colleague took the £20 note). Mrs Bailey's actions are not relevant to Mr Cappello's motive.

### **Timescales**

106. Counsel submits that there are no prescriptive timescales within the disciplinary policy for gross misconduct cases. Further, reference to 48 hours' notice he contends relates to the disciplinary interview and not the investigation. The Claimant was given 48 hours' notice in any event of the disciplinary hearing.

107. Counsel for the Claimant asserts Mrs Pike- Smart was trying to the accelerate process however, the Claimant was complaining in the investigation of the stress of the process and R1 had tried to slow things down to ensure Mr Lennon could attend but the Claimant was complaining that he wanted it dealt with more quickly:

(p.43)

*“SM said he has had the last two days at home with virtually no sleep. SDM said she did want so speak to SM earlier about this but SM wanted SL here. SDM said this was absolutely fine. SM said that there was no attempt speak to him whilst at home on Tuesday. SDM said that SM was on a rest day. SDM said that it wouldn’t be right to ring SM on a rest day when he wasn’t due to clock on until the Wednesday.”*

108. Counsel submits that with respect to the disciplinary hearing, 1 August date was a typographical error. The Claimant did not complain the disciplinary was being heard too quickly.
109. The Claimant compares his case to case which took one month to dismiss however, the respondent submits that R1 have not had time to produce evidence to explain the time it took in that case because this was only mentioned in Mr Green’s skeleton argument the evening before and it would not in those circumstances be legitimate to rely upon this to draw any inference.

### **Severity of sanction**

110. In terms of severity of sanction, R1 submit it is not a “*brilliantly*” worded disciplinary policy however under the list of types of misconduct (p.51) it does state that those offences may lead to summary dismissal and therefore the action was consistent with the policy. Further, it is submitted R1 enacted consistently from the outset and explained that what he had done may end in his dismissal.
111. It is submitted that there is clearly objective evidence to justify the decision that the Claimant’s conduct has an element of dishonesty in terms of inciting a passenger to steal. The value of the property submitted is not the issue, it is the element dishonesty.
112. The Claimant compares his case to 3 other cases;
113. In terms of the employee found to be driving negligently; it is submitted that it is not a comparable case.
114. In terms of the Air-Pod case; it is submitted that a driver left the property on the bus, the next driver did not follow the policy either and put the property in the bin. There was no element of dishonesty.
115. In terms of the employee who stole £20; Mr Cappello dismissed that employee. It was Mrs Bailey who reinstated on appeal, she did however state according to the documents (p112) that ;“*There is no doubt that the original decision of summary dismissal is correct due to the theft of lost property*”. She had taken into account his actions and that he had apologised for his actions. He was given a final warning and informed that any future issues with theft/honestly would be dealt with as they are matters of gross misconduct.
116. Council also disputes the submissions that the Claimant was not aware of the dishonesty element until later in the disciplinary process, because he had seen the complaint from the other passengers (p.34). Although the passenger who complained did not use the term dishonesty it was clear what was being alleged and it is semantics to say that the dishonest element was not present until the

disciplinary.

117. It is submitted that the Claimant case is based on an argument that the dismissal was so far outside the band of reasonable responses that the employment tribunal is likely to find the final hearing they must have been an ulterior motive, but that he does not get close to that position.

### **Conclusions and Analysis**

118. It is not in dispute between the parties that the application for interim relief was filed within the required 7 days period pursuant to section 161(2) and accompanied by a certificate in writing signed by an authorised official of the independent trade union which included the necessary information pursuant to section 161 (3) TULRCA. The procedural requirements therefore have been complied with.
119. In trade union cases, an employer's hostility to unions has often been treated as a persuasive factor in applications for interim relief.
120. The Claimant has produced documents which he alleges show hostility shown toward him because of his trade union activities, principally by Mr Irwin and Mr Sharman. He has not produced any documents which indicate any such hostility shown from those involved in the disciplinary and investigation process and in particular Mr Cappello who decided dismiss.
121. The Claimant does not positively assert that Mr Cappello was aware of the alleged trade union activities he relies upon and which he has set out in his witness statement, or that he was generally aware of animosity or a negative view of the management team toward the Claimant.
122. Further, the Claimant does not positively assert or produce documents to evidence that Mr Cappello was specifically at some point, put under some influence and if so by whom.
123. The Claimant relies fundamentally the fairness of the disciplinary process and in particular, the timing, the decision to treat the offence as gross misconduct and the severity of the sanction including when compared to others, as giving rise to a likelihood that the tribunal at the final hearing will consider it appropriate to draw an inference to establish the necessary causal connection between his trade union activities and the decision to dismiss him.
124. The Tribunal do not consider it likely that at the final hearing the tribunal will determine that the comments he posted on Blink are connected to his trade union activities including for example the decision to use a picture of a bus on a tow truck on his personal profile picture. The Claimant does not explain why, in the witness statement, those should be considered to be trade union activities. The Tribunal accepts the submissions of the Respondent, that there will have to be some examination at the final hearing, of what activities were trade union activities and the extent to which they contributed to any alleged animosity .
125. This is not a claim where there is on the face of the documents evidence of any link between the Claimant's trade union activities and a reason for the dismissal. R1 has recognised UNITE for 30 years.
126. In submissions counsel for the Claimant does not go as far as to specifically assert that Ms Pike-Smart who dealt with the investigation, had an improper motive or Ms Bailey. The focus in his submissions is on the reason why Mr Cappello acted as he did.
127. The Claimant will need to satisfy the tribunal that his trade union activities were



the sole or principal reason for the dismissal.

128. On the face of the documents, a passenger complained of conduct which indicated that the Claimant had encouraged a fellow passenger to take property which did not belong to them, off the bus. Property which as a driver the Claimant had a responsibility under R1's lost property policy, (which he was aware of), to secure and if he could not hand it in, to report it. He did neither.
129. There was an investigation meeting with the Claimant to allow him to explain. The Claimant is an experienced trade union representative who has been involved in disciplinary hearings in his trade union capacity. He was also accompanied by another trade union representative. Neither of them complained that the investigation meeting had been arranged too quickly. On the face of the documents it appears that the Claimant would have preferred to have been spoken to sooner, finding it stressful to have waited a couple of days until the investigation interview.
130. While Ms Pike-Smart did not use the term 'dishonesty', it appears from the documents that she described the offending conduct in clear terms as a serious complaint of property being given away. The Claimant was shown the CCTV footage at this early stage and the passengers email of complaint..
131. There was also a disciplinary hearing where on the face of the documents, the Claimant was given the chance to put forward his explanation.
132. On the face of the documents the Tribunal do not consider it likely that the tribunal at the final hearing will find that the Claimant gave explanations for his conduct which were consistent. Initially in the investigation hearing the Claimant stated (according to the notes) that he had not been aware that the umbrella did not belong to the passenger, while at the disciplinary hearing he alleges that he had forgotten to report the lost property.
133. The Tribunal do not consider it likely on the face of the documents, that what the Claimant was heard to say to the passengers on the CCTV footage did not support a reasonable belief that the Claimant had given the passenger to understand that she could take the property, even though it was not hers.
134. There was no complaint on the face of the documents, from the Claimant during the process that the disciplinary hearing had been arranged too quickly. Another case it is asserted took a month to get to dismissal however, cases can take longer than others for a variety of reasons. The Tribunal was not presented with any documents relating to the other case from which it would be reasonable to draw an inference adverse to R1. The Tribunal take into account that R1 was not aware of the intention to rely on this comparator until the evening before the hearing of this application. The case involving the Claimant however, on the face of the documents, was not a complicated case. There was clear CCTV footage with audio and a complaint from a witness. The documents do not show that the Claimant was concerned about the speed of the process and asked for any adjournments or further time to present his case.
135. In terms of notice requirements, the disciplinary procedure (p.46) provides that the disciplinary interview will result in the explanation of the employee being accepted or disciplinary action or dismissal. While it is not clearly spelt out whether the requirement for 48 hours' notice relates to the disciplinary hearing rather than the investigation stage, given that the policy states that the disciplinary interview may lead to dismissal, the Tribunal do not consider it likely that the tribunal at the final hearing would find that this notice requirement relates to the investigation hearing (conducted by Ms Pike-Smart) rather than the formal disciplinary hearing stage (conducted by Mr Cappello). The Tribunal also do not consider that it is likely, that the tribunal will find that the Claimant was not given at least 48 hours' notice of the

disciplinary hearing, even if it were to find that the requirement to give 48 hours' notice applied.

136. The Tribunal is not persuaded on the face of the documents, that at the final hearing the tribunal will find that Mr Cappello had not made it clear in the invitation letter that he considered the offence to be potentially gross misconduct which may result in his dismissal or that it was not made clear that some element of dishonest behaviour was being alleged.
137. The Tribunal is not persuaded that it is likely that the tribunal at the final hearing will find that the investigation or disciplinary procedure was conducted outside the band of reasonable responses.
138. Further, in terms of inconsistency of treatment, the Tribunal is not persuaded ( on the documents and submissions presented today) that it is likely that the tribunal at the final hearing will find that there was inconsistent treatment, that the case of negligent driving was comparable or the case where drivers did not report property or disposed of it. Further, on the face of the documents, Mr Cappello was not responsible for issuing the warning in the latter case. Where a driver was dishonest and took money from a purse, Mr Cappello dismissed.
139. While the employee who stole was reinstated that was, on the face of the documents, a decision taken not by Mr Cappello but Ms Bailey when faced with mitigation, which on the face of it, did not apply to the Claimant, in that the other employee admitted his guilt.
140. The Claimant relies essentially upon showing that the reason for dismissal was outside the band of reasonable responses. Where an employer advances an implausible alternative reason for dismissal, a tribunal may find that it is likely to be a cover-up for a true, inadmissible reason. The Tribunal do not consider on the face of the documents, that it is likely that at the final hearing, the tribunal will consider that the reason advanced was implausible.
141. The Tribunal see considerable force in Mr Feeny's submission that, taken at its highest, the Claimant's assertion that the dismissal was automatically unfair is based on speculation on his part that the dismissal was because of his union membership. Counsel for the Claimant did indeed find it challenging to articulate how the Claimant puts his case in terms of causation.
142. There does appear to be cogent evidence, at this preliminary stage and for today's purposes, to support the purported reason for the dismissal advanced by the Respondent, namely misconduct.
143. There is also no cogent evidence on the face of the documents, to support the Claimant's belief that the real reason was (or was principally) his union membership or activities.
144. For the purposes of section 163, the Tribunal making a broad assessment of this case on the documents and submissions, do not consider it likely that on determining this claim, the tribunal will find at the final hearing that the dismissal was outside the range of reasonable responses and that an adverse inference should be drawn from the severity of the sanction, the timing of consistency of treatment, that it is likely that the real reason was the Claimant's Union activities.
145. It follows from that decision that it is not appropriate to proceed to consider the question of what if any interim relief should be ordered in this case. The Claimant's application is dismissed and no order for interim relief is made.

Employment Judge Rachel Broughton

Date: 8 September 2023

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER ON

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