



THE EMPLOYMENT TRIBUNAL

SITTING: at London South (by CVP)

BEFORE: Employment Judge Tueje

BETWEEN:

TICHAONA NYAMADZAWO

Claimant

-and-

ABELLIO LONDON LIMITED

Respondent

ON: 30th and 31st May 2024

Appearances:

For the Claimant: Mr Nyamadzawo in person

For the Respondent: Ms Rebecca Jones (counsel)

JUDGMENT WITH REASONS

JUDGMENT

- (1) The complaint of unfair dismissal is not well-founded and is dismissed.
- (2) The complaint of unfair wrongful dismissal (notice pay) is not well-founded and is dismissed.
- (3) The complaint in respect of holiday pay is not well-founded and is dismissed.

REASONS

INTRODUCTION

1. Mr Nyamadzawo's employment contract, dated 10th November 2020, confirms he began working for the Respondent on 16th November 2020. He was employed as a PCV driver until he was summarily dismissed on 10th July 2023. At the date of the events leading up to his dismissal, Mr Nyamadzawo was based at the Respondent's Walworth garage.

2. Clause 19 of the employment contract includes the following:

“As a condition of your employment you are subject to and are required to conform to the Company Rules and Regulations which may, for the time being, be enforced and applicable and to become thoroughly acquainted with those rules and regulations relevant to your work.

A failure to comply with the Rules of Employment may lead to instigation of the Company Disciplinary procedure. In the event that you commit an act of gross misconduct or in other appropriate circumstances, the Company reserves the right to terminate your employment without notice or payment in lieu.”

3. Mr Nyamadzawo claims he was unfairly and wrongfully dismissed, and not paid for annual leave that had accrued but not been taken prior to his dismissal. The Respondent denies these complaints; it contends it was entitled to summarily dismiss Mr Nyamadzawo for gross misconduct, and he had been paid all wages he was entitled to, including any unused annual leave.
4. Mr Nyamadzawo’s claim form was presented to the Tribunal on 4th September 2023; the response form was received on 23rd October 2023.

HOUSEKEEPING

5. At the start of the final hearing on 30th May 2023, and before hearing any evidence, the Tribunal clarified the parties and the Tribunal had all the relevant information. Mr Nyamadzawo had a copy of all witness statements, but did not have the hearing bundle. The hearing bundle was e-mailed to Mr Nyamadzawo. We went through the hearing bundle, and Mr Nyamadzawo confirmed he had in fact previously received a copy of it. Mr Nyamadzawo also confirmed the bundle contained all the documents he intended to rely on.
6. A list of issues had not been agreed between the parties. Therefore, the Tribunal outlined the issues for determination; both parties confirmed they understood and agreed the issues. Ms Jones prepared a written list of those issues and e-mail it to Mr Nyamadzawo and the Tribunal.
7. Mr Nyamadzawo subsequently confirmed he had received the list of issues, which reflected those outlined earlier by the Tribunal. He confirmed he wished to pursue all three complaints (see paragraph 3 above), and clarified he was not claiming for discrimination.

THE FINAL HEARING

8. The Tribunal first heard evidence on behalf of the Respondent from the following employees:
- 8.1 Ms Shahlene Johnson, a Relief Driver Manager; and
- 8.2 Ms Lorna Murphy, the Operations and HR Director.

9. The Tribunal also heard oral evidence from Mr Nyamadzawo, before hearing closing submissions from both parties.
10. The following documents were provided for use at the final hearing:
 - 10.1 A 139- page hearing bundle;
 - 10.2 Mr Nyamadzawo's 6-page Grounds of Unfair Dismissal document dated 10th March 2024 (treated as his witness statement);
 - 10.3 Ms Johnson's witness statement dated 28th May 2024; and
 - 10.4 Ms Murphy's witness statement dated 24th May 2024.

ISSUES FOR THE TRIBUNAL

11. As regards liability, the issues for determination by the Tribunal are below.

Unfair Dismissal

12. The issues relevant to unfair dismissal are as follows:
 - 12.1 What was the reason or principal reason for dismissal?
 - 12.2 Was it a potentially fair reason?
 - 12.3 Did the Respondent genuinely believe the Claimant had committed misconduct.
 - 12.4 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? In particular, whether:
 - (i) there were reasonable grounds for that belief;
 - (ii) at the time the belief was formed the Respondent had carried out a reasonable investigation;
 - (iii) the Respondent otherwise acted in a procedurally fair manner; and
 - (iv) dismissal was within the range of reasonable responses.

Wrongful Dismissal

13. The issues relevant to wrongful dismissal are as follows:
 - 13.1 What was Mr Nyamadzawo's notice period?
 - 13.2 Was Mr Nyamadzawo paid for that notice period?
 - 13.3 If not, was Mr Nyamadzawo guilty of gross misconduct?

Holiday Pay

14. Did the Respondent fail to pay Mr Nyamadzawo for annual leave accrued but not taken by the date of his dismissal?

FINDINGS OF FACT

15. As regards findings of fact on matters in dispute, these were reached on a

balance of probabilities, having considered the witnesses' evidence, including documents referred to in that evidence, and taking into account my assessment of the evidence.

16. Only findings of fact relevant to the issues, and those necessary to determine the issues, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. I have not referred to every document that I read and/or was taken to in the findings below, but that does not mean it was not considered if it was referred to in the evidence and was relevant to an issue.

Background

17. The relevant terms of Mr Nyamadzawo's employment contract are outlined at paragraphs 1 and 2 above. These include clause 19 which states he may be dismissed without notice if he is found guilty of gross misconduct.
18. Section 4 of the Respondent's disciplinary policy provides a non-exhaustive list of acts amounting to gross misconduct. These include a failure to conduct a First Use Check ("FUC") at all in accordance with the Respondent's Vehicle Condition Procedure ("VCP").
19. The VCP states FUC are a legal requirement comprising 104 checks a driver must carry out when taking over a bus that is already in service. These include checking the ramp. The final requirement of the FUC is that drivers complete a Vehicle Condition Report ("VCR"), recording any defects and reporting these.

Events on 11th June 2023

20. On 10th June 2023 the Respondent received a report of a defective ramp on vehicle fleet number 1521, which therefore should have been removed from service until this was rectified.
21. On 11th June 2023, Mr Nyamadzawo was due to start work at 15:22, and allowing for him to carry out the FUC, he was due to leave the depot at 15:32. Mr Nyamadzawo telephoned the Respondent approximately 15 minutes before his shift explaining he was running late because he had taken a relative to the airport so they could attend a funeral abroad.
22. At the garage on 11th June 2023, Mr Nyamadzawo manually signed in on the Driver Duty Log Card at 15:28. But according to the Respondent's electronic records, Mr Nyamadzawo signed in at 15:32. During his shift on that day he drove fleet number 1521.
23. There are timed CCTV stills; Mr Nyamadzawo accepts he is the person shown in these images. Stills from the bus's CCTV show Mr Nyamadzawo the bus's engine is turned on at 15:34:02, and the bus moves to depart at 15:34:18.
24. Mr Nyamadzawo signed the Respondent's Daily First Use Check document stating he completed the FUC for fleet number 1521 at 3.35pm.

25. The Respondent's records show that the ramp on vehicle fleet number 1521 was reported as defective on 12th June 2023. Ms Uvri Patel, the Respondent's Operations Manager, was copied into this e-mail, and related e-mails sent around this time regarding the ramp on this vehicle.
26. As the Respondent's records showed the ramp was reported to be defective on 10th June and 12th June 2023, it wanted to ascertain whether the 10th June defect report could be closed off. The Respondent tried to check the VCR for 10th June 2023, but discovered it was missing. Therefore, it viewed the vehicle's CCTV for 11th June 2023 to see whether the ramp was checked and shown to be working as part of the FUC. On checking the CCTV, the Respondent did not see Mr Nyamadzawo checking the ramp, and so began an investigation to establish why. That investigation triggered the process which culminated in Mr Nyamadzawo's dismissal.
27. In brief, there was an investigation meeting held on 22nd June 2023, followed by a disciplinary hearing on 6th July 2023, and finally an appeal hearing on 23rd July 2023. These are described in greater detail below.

Mr Nyamadzawo's Claim

28. Section 8.2 of the claim form states the reasons for the claim as follows:

I was dismissed of not completing first-user check for the bus- the wheelchair ramp in particular. The CCTV was not clear as it shows myself leaving the depot and was cut short. The other CCTV showed myself walking to the bus and it was blurred.

This case was exaggerated because I had just received an offer of a higher job which they have been blocking me from the beginning on other posts.

They even blocked me to receiving a Bus Driver London licence that every other driver is entitled to after two year service. No clear explanation was given.

Similar drivers have done worse in the company such as sleeping whilst driving members of the public but they still got a job within that company. This is my first sanction and was dismissed straight away without following their guidelines of gross misconduct in their handbook as to repetition of poor performance. I am a targeted and the person who completed the disciplinary was part of the investigation through cc'd on emails. The person who i appealed to is head of their operations and head of their HR. The unite representative work with them into soliciting members into admitting the cases so they can get away with what they want. They are not separate or impartial body within this company. The company disciplinary notes misses out a lot of discussions as they write on their own and clean up all that is not in their way (proved)

29. Additional information at section 15 of the claim form, Mr Nyamadzawo states:

Proof that this case was designed to get rid of me and not my fault but other people's fault such as the engineers who did not produce documents as part of the investigation

30. Mr Nyamadzawo elaborates on the above in his Grounds of Unfair Dismissal, which was treated as his witness statement. In general terms he complains that the dismissal procedure was unfair, and there was insufficient justification for dismissing him. The specifics of the claim are as follows:
- 30.1 Mr Nyamadzawo called the Respondent before his shift to explain he was running late. However, he arrived on time, although he was rushing, so checked the bus in the yard when he arrived. A little while after arriving, a colleague called Ade asked him whether he signed in. It was only then that he signed in, which was some time after he arrived.
- 30.2 He can only recall what happens from shift to shift by referring to records such as the Driver's Duty Card, CCTV or the VCR.
- 30.3 The Grounds state Mr Nyamadzawo believes he completed the FUC on 11th June 2023.
- 30.4 In breach of his right to confidentiality, Mr Fleming was present during the investigation meeting. Mr Nyamadzawo was not introduced to Mr Fleming, but Mr Fleming gave Ms Johnson advice during the meeting.
- 30.5 Ms Johnson also sought advice from Ms Patel (who later chaired the disciplinary hearing) during an interlude in the investigation meeting.
- 30.6 Ms Johnson advised Mr Nyamadzawo that he should admit to Ms Patel that he failed to carry out the FUC, and he should apologise. Saying if he did so, he may only receive a warning.
- 30.7 E-mail correspondence between 16th and 19th June 2023 shows Ms Patel was involved with the investigation even though she later chaired the disciplinary hearing.
- 30.8 When Ms Johnson sent Mr Nyamadzawo the interview notes a few days later, they were inaccurate. Ms Patel and Ms Murphy were told about this during the disciplinary and appeal hearings respectively.
- 30.9 Mr Nyamadzawo had to cancel his holiday to prepare for the disciplinary hearing (this is the basis of Mr Nyamadzawo's holiday pay claim).
- 30.10 The Grounds continue: *"On the 6th July 2023, Mr Tichaona Nyamadzawo (Claimant) attended a disciplinary hearing by the company inserted Trade Union representative."*
- 30.11 Mr Taf and Ms Patel were seen speaking to one another before the disciplinary hearing. Mr Taf was the union representative who represented Mr Nyamadzawo at the disciplinary meeting. In his oral evidence Mr Nyamadzawo explained Mr Taf was the elected representative for a different garage. He stated Mr Taf told him he had two choices: to apologise and receive a warning letter, or to resign with immediate effect.

- 30.12 Ms Patel told Mr Taf not to ask questions on Mr Nyamadzawo's behalf during the hearing, and he was only permitted to contribute at the end.
- 30.13 Ms Patel's notes of the disciplinary hearing were inaccurate.
- 30.14 Mr Nyamadzawo requested CCTV for 15 minutes prior to 15:28 but this was not provided.
- 30.15 During the appeal hearing, Ms Murphy stated she had a right to withhold CCTV footage.
31. Mr Nyamadzawo's written evidence refers to some of the Respondent's employees as working against him. He elaborated on this during cross examination. Therefore, towards the end of his oral evidence, Mr Nyamadzawo was asked to identify those individuals working against him. He clarified the individuals were Ms Patel, who was angry because he had applied for promotion to the post of Relief and Lost Mileage Analyst without telling her first. He also identified Mr Fleming, who he believed was involved in the decision to suspend him. He stated Mr Taf was working against him, and the engineers. Although he couldn't name the engineers concerned, he said they were the engineers who exchanged e-mail between 16th and 19th June 2023, whose names are redacted.
32. Mr Nyamadzawo was also asked to clarify which aspects of the Respondent's written records of meetings and hearings he disputed. He specified three inaccuracies with Ms Johnson's record of the investigation meeting. Firstly he said Ms Johnson only asked whether he checked the ramp, he was not asked whether he carried out the FUC. Secondly, he asked for additional CCTV during the investigation meeting, but his request isn't recorded in the minutes. Thirdly, he stated during the meeting he told Ms Johnson he checked the ramp, but again that wasn't recorded in the meeting notes.
33. As to inaccuracies in the record of the disciplinary hearing, Mr Nyamadzawo said he asked for more CCTV, which isn't recorded. Finally, as regards the appeal hearing, he states Ms Murphy had said she didn't need to show anyone the CCTV, but that isn't recorded in the minutes.

The Disciplinary Process

34. Unless otherwise stated, the matters set out at paragraphs 35 to 78 below in relation to the investigation, disciplinary and appeal hearings are either agreed or unchallenged.

The Respondent's Investigation

35. Ms Johnson was tasked with carrying out the investigation, and she invited Mr Nyamadzawo to attend an investigation meeting with her on 22nd June 2023.
36. During the investigation meeting, another manager, Mr Norman Fleming, was present, but Ms Jonson did not introduce him to Mr Nyamadzawo. She said Mr

Fleming was using the room to work due to a shortage of space. According to her, Mr Fleming and did not participate in the meeting, but Mr Nyamadzawo disputes this.

37. Ms Johnson prepared a record of this meeting which was in the hearing bundle. Mr Nyamadzawo did not agree the written record accurately reflected the discussion at the meeting. During the Tribunal hearing he also took issue with the Respondent's written record of the disciplinary and appeal hearings. His challenge to these written records is dealt with at paragraphs 107 to 114 below.
38. Ms Johnson's record of the investigation meeting indicates she asked Mr Nyamadzawo about both the FUC and checking the ramp. Mr Nyamadzawo disagrees: he says Ms Johnson only discussed whether he checked the ramp. It's agreed they viewed the vehicle's CCTV during the investigation meeting. Regarding checking the ramp on 11th June, Mr Nyamadzawo's response was that he normally checks the ramp before driving off. When Ms Johnson asked again whether he checked the ramp on 11th June, he said he couldn't remember whether he checked it.
39. There were two brief adjournments during the investigation meeting. Mr Nyamadzawo alleged Ms Johnson took advice from Ms Patel during the adjournment. As part of her enquiries for the appeal, Ms Murphy asked Ms Johnson whether she spoke to Ms Patel during the adjournment, Ms Johnson said she didn't recall doing so.
40. At the end of the investigation meeting Ms Johnson informed Mr Nyamadzawo that he was suspended, and that she concluded there was a case to answer as to whether there had been gross misconduct. She noted Mr Nyamadzawo was due to go on annual leave imminently, and suggested the disciplinary hearing could take place after his annual leave ended, and she asked when that would be. Mr Nyamadzawo agreed and confirmed he was due to return from annual leave on 6th July 2023.
41. Consequently, Ms Johnson sent Mr Nyamadzawo two letters dated 26th June 2023. The first was an amended letter confirming his suspension and the terms of his suspension. The second letter notified him a disciplinary hearing would be held on 6th July 2023 at 11.00am to consider whether he was guilty of gross misconduct. The letters were e-mailed to him on 27th June 2023, while he was on annual leave. Also attached to the e-mail was the record of the investigation meeting and the Respondent's disciplinary policy.
42. Mr Nyamadzawo e-mailed Ms Johnson back on 27th June 2023; he wrote:

*"Dear Shahlene
Thank you for your e-mail and hope that you are well. I understand that you are penalising me for incomplete first user checks. No ramp check in. I couldn't prove myself going around the bus as the CCTV only shows from end of 15:34hrs. It is important to check around the bus sides (including tyres) at depot before turning on the engine as some of these buses may still be plugged in.
-1, is there a longer CCTV footage on this day from 15:20 - 16:00 hrs."*

43. In his e-mail, Mr Nyamadzawo also raised the following queries:

43.1 Whether another driver who drove the bus reported the ramp was defective.

43.2 Requesting the VCR for 10th June 2023, querying whether the VCR was checked on Saturday 10th June and Monday 12th June.

43.3 Asking why he had been given a vehicle off road, whether it was deliberate or if someone had made a mistake.

44. Mr Nyamadzawo's e-mail concluded:

Could you please let me know the answers to these five questions so I can pass them to my legal representative. (not Union) For now, could you please let Gordon Tafadzwa Mkudu to be my representative on this day as a member of the trade union and let Sarah Liles know as an alternative. I am not in contact with these people but now as according to the suspension letters

45. Ms Johnson responded to Mr Nyamadzawo's e-mail by explaining her involvement with the matter had ended, so she would forward his e-mail to the disciplinary manager. Due to GDPR, Ms Johnson had in fact deleted her e-mails regarding the investigation as soon as her involvement ended. Despite Ms Johnson deleting these e-mails, Mr Nyamadzawo nonetheless confirmed that e-mail exchange was in the bundle. Based on discussions at the start of the hearing, the Tribunal understands the copy of those e-mails in the bundle were provided by Mr Nyamadzawo.

The Disciplinary Hearing

46. The disciplinary hearing was held at 11.00am on 6th July 2023, which was Mr Nyamadzawo's first day back after annual leave.

47. Ms Murphy's written and oral evidence dealt firstly with the disciplinary hearing conducted by Ms Patel, the Respondent's Operations Manager. Ms Patel is no longer employed by the Respondent, so she did not prepare a witness statement nor give oral evidence to the Tribunal. However, the Respondent relied on the written record of the disciplinary hearing prepared by Ms Patel, and as stated, Mr Nyamadzawo disputes the accuracy of that written record.

48. At the disciplinary hearing Mr Nyamadzawo was represented by a Unite trade union representative, Mr Mkudu Taf. Ms Patel explained the purpose of the hearing was to reach a decision on whether there had been gross misconduct due to Mr Nyamadzawo's alleged failure to carry out a FUC in accordance with the VCP. She advised an adverse finding could result in dismissal.

49. Ms Patel summarised the position as she understood it: in brief that Ms Johnson's investigation concluded there was a case for Mr Nyamadzawo to answer as to whether he carried out the FUC on 11th June 2023. She continued,

on that day, he was running late for work, and that he could not remember whether he carried out all the checks. According to Ms Patel's record, Mr Nyamadzawo confirmed the above account was correct. However, during his oral evidence to the Tribunal, Mr Nyamadzawo stated he told Ms Patel he did carry out the FUC but she didn't record this.

50. The written record shows Ms Patel continued that according to the CCTV he did not check the ramp. She asked Mr Nyamadzawo what he could recall about 11th June 2023. Mr Nyamadzawo responded that except that he remembered he was running late, that he had checked whether the bus was plugged in, and checked the panel, he didn't recall much else that happened at the depot. Again, Mr Nyamadzawo does not accept he said he cannot recall whether he carried out the FUC as his oral evidence is he told Ms Patel he had carried out the check.
51. When Ms Patel asked whether he had signed in at 3.32pm, Mr Nyamadzawo stated he didn't know as the time recorded on the signing in device is not always in sync with the time recorded by the vehicle's equipment.
52. Ms Patel states CCTV showed Mr Nyamadzawo arriving at the bus at 3.33:00 pm, leaving the depot at 3.34:48, and asked whether that was sufficient time to do the FUC. Mr Nyamadzawo confirmed it was insufficient time, and he then requested additional CCTV footage.
53. The written record states they watched the CCTV from the vehicle that had also been watched during the investigation meeting. The record also states they watched additional CCTV from the depot, which Mr Nyamadzawo had not previously been shown.
54. The hearing was briefly adjourned, and when it resumed, Mr Nyamadzawo made an oral statement explaining he was running late on 11th June 2023, knew his bus had to arrive at Victoria at a particular time, and although he was panicking, he was otherwise alright and fit to drive. He explained he was trying to answer questions based on the CCTV, he would take on board feedback from what happened, and try to improve and learn from his mistake.
55. Ms Patel asked why he manually signed in at 3.28pm, before his actual arrival time. Mr Nyamadzawo said he recalled running late and panicking, and sometime after his arrival a colleague Ade, asked if he had clocked in. As he hadn't done so before, it was only after Ade asked him that he clocked in. He couldn't recall what time he clocked in. Therefore, Mr Nyamadzawo's position seems to be he only signed in after Ade reminded him to do so.
56. When asked why he signed to say he had completed the FUC, Mr Nyamadzawo said he believed he had carried it out. But he continued that, having viewed the CCTV, he accepted the CCTV showed he hadn't checked the ramp, he reiterated he thought he had carried out the FUC, but he cannot remember what happened that day.
57. Mr Taf asked Mr Nyamadzawo a few questions, before summing up on his behalf. In summing up, Mr Taf stated that sometimes drivers operate on autopilot

when completing paperwork. Having viewed the CCTV, Mr Nyamadzawo understood he had made a mistake, people make mistakes, and Mr Nyamadzawo is sorry. It is his first offence, albeit a serious one. He is a good driver, and he should not lose his job. He has been a mentor, and this incident may warrant a written or verbal warning but not dismissal.

58. The hearing was adjourned for 1 hour and 25 minutes. When it resumed, Ms Patel gave her decision. The decision was that the allegation of gross misconduct was proven as a result of Mr Nyamadzawo failing to carry out the FUC, for which he was summarily dismissed. She explained her reasons, which included that Mr Nyamadzawo had signed the VCR, a legal document, stating he had carried out the FUC. She says it was unacceptable that Mr Nyamadzawo falsified this document. She noted that although his customer service was excellent, his driving standard was low due to a few avoidable collisions. She referred to the potentially serious consequences for the Respondent resulting from Mr Nyamadzawo's failure to carry out the FUC, which she said, could also impact its operating licence. Her decision was confirmed in a letter sent to Mr Nyamadzawo dated 10th July 2023, which enclosed a copy of the hearing notes.

The Appeal

59. In an e-mail sent on 14th July 2023, Mr Nyamadzawo informed the Respondent he wished to appeal against the decision to summarily dismiss him.

60. The relevant part of his e-mail reads:

I was dismissed on 10th July 2023 and would like to appeal on this decision.

1, I believe the process of the disciplinary was not followed 2, I have been employed by Abellio for over 2 years without prior sanctions 3, I believe the decision was already taken before I was heard 4, I was going through a personal issue and my frame of mind was not 100%.

61. Ms Murphy gave evidence to the Tribunal regarding the appeal hearing, which she chaired.

62. The appeal hearing took place on 24th July 2023. Mr Nyamadzawo was represented by Anthony "Marshall" Green, a Unite trade union representative.

63. At the hearing Ms Murphy went through the four points raised in Mr Nyamadzawo 14th July 2023 appeal request, and asked him to elaborate on each ground, which he did as set out at paragraphs 64 to 67 below.

64. The failure to follow the disciplinary process related to the following:

64.1 Ms Patel's letter dated 10th July 2023 wrongly identified Jasim as the investigator instead of Ms Johnson.

64.2 Mr Fleming was in the room during the investigation meeting.

- 64.3 When the investigation meeting was adjourned, Ms Johnson spoke to Ms Patel.
- 64.4 Ms Patel had been involved with the case prior to conducting the disciplinary.
- 64.5 The 10th June 2023 VCR was missing.
- 64.6 The CCTV should have been checked for a longer period: 15 minutes before and after the material events.
- 64.7 No CCTV was provided for Victoria station even though he may have done checks there when he arrived.
- 64.8 Some points were omitted from the meeting notes or had been rephrased, and the notes should have been shown to him at the time of the meeting or hearing, and not 2-3 days later.
- 64.9 He acknowledges he did not check the ramp, but feels that he's been made a scapegoat. The Tribunal notes Mr Nyamadzawo did not expressly challenge Ms Murphy on the basis that she had recorded this inaccurately. Nor did he identify this as an inaccuracy in the minutes when asked (see paragraphs 107 to 114 below).
- 64.10 There were discrepancies in timings: there were different times for signing on and for going to the bus. He cannot say the times are correct.
65. Ms Murphy then asked Mr Nyamadzawo to elaborate on his service record. He said he has worked for Abellio for 2½ years and had helped where he could. He had never been in trouble, never had complaints made against him or received a verbal warning. He has never had any problems with a manager. He said he works hard, and wants to do well and was due to be promoted to the post of Relief Loss Mileage Analyst.
66. As to the decision being made in advance, Mr Nyamadzawo said others were involved in the investigation. Ms Johnson was talking to Mr Fleming and Ms Patel during the investigation phase.
67. Regarding his personal issue and his frame of mind not being 100%, he explained he had taken someone to the airport, got stuck in traffic, and that's what made him late. He had never been late before. He was not in his usual state of mind due to what was happening at home, there was a funeral, and lots of arrangements to make, but he was alright to drive.
68. Mr Nyamadzawo also claimed the avoidable incidents Ms Patel referred to were not his fault.
69. Mr Nyamadzawo acknowledged he had made a mistake and said he will not make that mistake again. Mr Green added that everyone makes mistakes, and dismissal was too harsh.

70. The hearing was adjourned for almost 4 hours while Ms Murphy made enquiries of Ms Johnson and Ms Patel. Ms Murphy's notes from her discussions with them both were in the hearing bundle. These show Ms Murphy asked each of them about the points Mr Nyamadzawo raised at paragraphs 64.1 to 68 above. This included asking each of them whether they had spoken during the investigation meeting. Ms Johnson responded she didn't recall speaking with Ms Patel; Ms Patel stated the two of them did not speak.
71. When the hearing resumed, Ms Murphy pointed out the failure to complete the FUC is listed as gross misconduct in the disciplinary policy. She also pointed out that CCTV from Victoria station was viewed during the disciplinary hearing, but showed Mr Nyamadzawo did not carry out the FUC at Victoria.
72. Ms Murphy then addresses the points Mr Nyamadzawo raised in support of his grounds of appeal.
73. On the first ground about failure to follow the disciplinary process, Ms Murphy explains Mr Fleming was not involved in the investigation meeting, but was merely working in the room due to a lack of space. Ms Johnson and Ms Patel confirmed they did not discuss the case when the investigation meeting was adjourned. Ms Patel told Ms Murphy she did not predetermine the outcome of the disciplinary meeting: she secured additional CCTV footage and listened to the points raised before reaching a decision.
74. Ms Murphy stated no additional CCTV could be provided because the only CCTV available from the vehicle had already been provided. She continued, the CCTV is activated when the engine is switched on, therefore it wasn't possible to provide CCTV from the bus 15 minutes prior to 15:34 because the CCTV wasn't recording at that time. She added the engine needs to be switched on to carry out the FUC, therefore if Mr Nyamadzawo had switched on the engine to carry out the FUC, the CCTV would have recorded him carrying it out. As to additional CCTV of the garage, Ms Murphy stated those recordings would no longer have been available by the date of the appeal hearing.
75. Ms Murphy was satisfied the CCTV relied on correctly recorded the time because the timings were consistent. For instance, Mr Nyamadzawo signs in electronically, which is consistent with the recording showing him walking across the yard at that time. Shortly afterwards he enters the bus, switches the engine on and drives out of the station.
76. Mr Nyamadzawo was not being scapegoated: the investigation began because they needed to establish whether the defective ramp reported on 10th June 2023 could be closed off. The VCR for 10th June 2023 couldn't be found: they sometimes go missing. The missing 10th June 2023 VCR is what led to them checking the CCTV on 11th June 2023. She explains what the avoidable collisions related to, clarifying no one spoke to Mr Nyamadzawo about these at the time. It was accepted that Jasim was incorrectly named on the disciplinary outcome letter instead of Ms Johnson.

77. Ms Patel had confirmed to Ms Murphy that due to the disciplinary, she had requested Mr Nyamadzawo's promotion is paused pending the outcome.
78. Ms Murphy explains she is upholding the decision to summarily dismiss Mr Nyamadzawo for gross misconduct.

Findings on Facts in Dispute

79. Having considered the parties' written and oral evidence, I make the following findings on the facts which are disputed.

Arrival at work on 11th June 2023

80. The Respondent argues Mr Nyamadzawo arrived late for work on 11th June 2023: his shift was due to start at 15:22. However he clocked-in manually at 15:28 and clocked in electronically at 15:32, both of which are after the start time for his shift. Ms Jones argued, it was because Mr Nyamadzawo was running late that he failed to carry out the FUC.
81. Mr Nyamadzawo acknowledges that on 11th June 2023 he called around 15 minutes before his shift was due to start because he was running late. The written record of the investigation meeting, the disciplinary hearing and the appeal hearing all record him as accepting he had arrived at work late. Mr Nyamadzawo has not alleged that those notes incorrectly record him admitting to arriving late
82. However, during his oral evidence, Mr Nyamadzawo stated he did not arrive at work late. He still accepted that he had called to say he was running late, but also said that in the end he managed to arrive on time. He explained that he manually signed in at 15:28, but that he had manually signed in after he had arrived, and only after Ade had reminded him he should sign in. Therefore, he said, he arrived before, and not at, the time he manually signed in.
83. I find Mr Nyamadzawo arrived at work late, which is consistent with the contemporaneous manual and electronic signing in records, and the CCTV showing him walking across the depot at 15:32. It is also consistent with Mr Nyamadzawo accepting during the investigation meeting, the disciplinary and appeal hearings that he arrived late. I do not accept Mr Nyamadzawo would have admitted in these meetings that he arrived at work late if he had in fact arrived at work on time: this would not make sense.

Completing the FUC

84. When asked during the investigation meeting, Mr Nyamadzawo stated he could not remember whether he checked the ramp. Ms Patel reminded him during the disciplinary meeting that he had told Ms Johnson he could not remember checking the ramp; Mr Nyamadzawo did not dispute that was what he had told Ms Johnson. Ms Patel concluded that Mr Nyamadzawo would not have sufficient time to carry out the FUC because he arrived at work, then drove out of the garage, within a 2-minute period. During the disciplinary hearing, he reiterated

he could not remember whether he completed the FUC, acknowledging he is not seen checking the ramp in the CCTV recordings. In the appeal hearing, Mr Nyamadzawo confirms he did not check the ramp.

85. In both the disciplinary and appeal hearings, the union representatives mitigate on the basis that Mr Nyamadzawo did not check the ramp.
86. However, during cross examination, Mr Nyamadzawo positively stated that he had checked the ramp on 11th June 2023. Ms Jones challenged him about that. She asked why he said during the investigation meeting and disciplinary and appeal hearings that he couldn't remember checking the ramp, or had accepted he didn't check it. She pointed out his appeal request, ET1 claim form, and his Grounds of Unfair Dismissal do not positively assert he checked the ramp. She also asked why he apologised, and why his union representatives had mitigated on the basis that he had not checked the ramps.
87. Mr Nyamadzawo's response was that during the disciplinary and appeal hearings he had said he checked the ramp, but the minutes failed to record this. He also stated that despite telling the union representatives he had checked the ramps, each advised him to admit he failed to carry out the checks and apologise. However, I find it unlikely that his union representatives would advise him to admit he didn't check the ramp if he had told them he checked the ramps. The union representatives are likely to know that failure could lead to dismissal, and I see no reason why they would ask him to admit to something so serious if he had told them he did check the ramp.
88. I do not accept that Mr Nyamadzawo checked the ramp. In part, he was being dismissed for failing to check the ramp. If he had in fact checked the ramp, he would have said so in the meeting and hearings. And if he had said so, but that was omitted from the written records, he would have raised that important omission when he received these, but he didn't. Furthermore, if Mr Nyamadzawo had positively asserted he checked the ramp, it is also unlikely that Ms Johnson, Ms Patel and Ms Murphy would all omit the same highly relevant information from their written records.
89. While Mr Nyamadzawo's position is that Ms Patel was working against him, he said Ms Johnson treated him fairly, and he did not allege Ms Murphy had any axe to grind. So, if Mr Nyamadzawo had told Ms Johnson and Ms Murphy that he checked the ramp, they had no reason to omit that from their written record.
90. I also find that if Mr Nyamadzawo had checked the ramp as he is now claiming, he would have mentioned that in his e-mails sent on 27th June and 14th July 2023. He would have raised this in his claim form and Grounds of Unfair Dismissal, but neither document contains such a claim.
91. Furthermore, there were times when Mr Nyamadzawo's oral evidence suggested he could not specifically remember checking the ramp, but instead believed he would have checked it on 11th June because he always checked it. He also sought to rely on the absence of evidence showing he did not check the ramp, in particular, that the CCTV relied on by the Respondent covered a short period of time when he had requested CCTV footage for a longer period.

92. However, the Respondent states the CCTV on the bus is only activated when the engine is switched on, and the engine needs to be switched on to deploy and check the ramp. Therefore, I find that the reason there is no CCTV of Mr Nyamadzawo checking the ramp is because he did not check the ramp.
93. Mr Nyamadzawo accepted the engine needs to be switched on to check the ramp, but he did not accept the CCTV on the bus is only activated when the engine is switched on. However, he did not challenge Ms Murphy when she said this in cross examination. Furthermore, it's evident from the stills that the bus has CCTV. The CCTV is not switched on manually by the drivers, making it more likely than not that the CCTV is activated when the engine is switched on, as Ms Murphy said.
94. As stated, it's common ground that the engine needs to be switched on to check the ramp. I consider this explains why there is no CCTV showing Mr Nyamadzawo checking the ramp: because he did not deploy the ramp when the CCTV was recording, and he could not deploy the ramp unless the engine had been switched on. Had he switched on the engine to check the ramp, there would be a recording to show this.
95. Finally on this issue, closer to the events taking place, Mr Nyamadzawo is consistently recorded as stating he could not remember checking the ramp. Therefore, I find it unlikely that one year later he would remember that he had in fact checked the ramp. Accordingly, I find Mr Nyamadzawo did not check the ramp on 11th June 2023.

The Investigation

96. Mr Nyamadzawo complains that because Ms Patel chaired the disciplinary hearing, and that it was inappropriate for her to be involved in the investigation by being copied in to e-mails exchanged between 16th and 19th June 2023. However, in my judgment, Ms Patel was not involved in the investigation for a number of reasons. Firstly, the e-mails pre-date the investigation, and in fact the e-mails triggered the chain of events that led to the investigation. Therefore, at the time they were written, there wasn't yet an investigation. Secondly, the purpose of the e-mail exchanges was to ascertain whether the defective ramp was repaired. Whereas the subject matter of the investigation was whether Mr Nyamadzawo had checked the ramp as part of the FUC. Thirdly, it's unsurprising Ms Patel was copied into the e-mails because she was the Operations Manager, and was copied in to the e-mails in that capacity. She was not included in the e-mail chain in her capacity as chair of the disciplinary hearing.
97. On a related issue, I accept Ms Johnson's witness statement which says she did not speak to Ms Patel during the investigation meeting. Her evidence is supported by Ms Patel's account as recorded in Ms Murphy's notes of the enquiries the latter made during the appeal hearing. Ms Patel denied speaking with Ms Johnson during the investigation meeting.
98. As to whether Mr Fleming advised Ms Johnson during the investigation meeting as Mr Nyamadzawo contends. I find Mr Fleming did not participate in the

meeting, for instance by advising Ms Johnson. I accept Ms Johnson's evidence that Mr Fleming did not advise her because that is supported by her contemporaneous record of the meeting: it makes no reference to any contribution by Mr Fleming. I consider it was unwise that Ms Johnson conducted the investigation meeting while Mr Fleming remained in the room during the investigation meeting, but I do not find it resulted in procedural unfairness.

99. Mr Nyamadzawo states that during the meeting Ms Johnson told him that if he apologised for failing to check the ramps he may receive a warning. Ms Johnson denied saying this. For two reasons I accept Ms Johnson's evidence that she did not advise Mr Nyamadzawo as he claims. Firstly, I found Ms Johnson to be a credible witness who gave consistent evidence. Secondly, Ms Johnson's role was to investigate the facts and make a recommendation as to whether disciplinary action was warranted. To advise Mr Nyamadzawo would go beyond the remit of the investigation she was tasked with. Ms Johnson was mindful that her role was only to investigate the matter, which is evidenced by her response to Mr Nyamadzawo's 27th June 2023 e-mail. This shows Ms Johnson conscientiously kept within the remit of her role, which is inconsistent with Mr Nyamadzawo's allegation that she strayed into giving him advice.

Whether Mr Nyamadzawo's Dismissal was Predetermined

100. Mr Nyamadzawo claims the decision to dismiss him was made in advance. The Respondent claims the decision was made by Ms Patel at the end of the disciplinary hearing, following an adjournment. As stated, Ms Patel did not give evidence to the Tribunal. Nonetheless, I have found no evidence that her decision was predetermined. During the disciplinary hearing Ms Patel asked Mr Nyamadzawo a number of questions to obtain relevant information required to reach a decision. She obtained additional CCTV footage which was shown to Mr Nyamadzawo during the hearing. She also adjourned the hearing for almost 1½ hours before returning to give her decision. Furthermore, in explaining the reasons for her decision, Ms Patel referred to some of Mr Nyamadzawo's answers given during the disciplinary hearing. I find Ms Patel asking questions, obtaining further CCTV evidence at Mr Nyamadzawo's request, and referring to points that he had raised, is inconsistent with her having predetermined the outcome. Instead, I consider these factors are more consistent Ms Patel seeking to determine what happened, taking on board what is said, then taking time to reach her decision based on the available evidence.

CCTV Evidence

101. Mr Nyamadzawo states part of the CCTV has been withheld leaving him unable to properly establish that he checked the ramp. As stated above, Ms Murphy's evidence is that all available CCTV was provided to Mr Nyamadzawo, which I accept for the reasons stated at paragraphs 92 to 94 above, and paragraphs 102 and 103 below.
102. I have also taken into account that during the investigation meeting Mr Nyamadzawo was shown CCTV from the bus. He subsequently requested additional CCTV. Ms Patel's written record of the hearing states Mr

Nyamadzawo was shown additional CCTV footage during the disciplinary hearing, which was CCTV footage from the garage. Mr Nyamadzawo did not state that aspect of the minutes was inaccurate, so I will accept the written record at face value, which states that Mr Nyamadzawo was shown additional CCTV. Furthermore, Mr Nyamadzawo's grounds of appeal sent on 14th July 2023 don't request additional CCTV. Nor do his grounds of appeal suggest CCTV evidence has been withheld. I consider the absence of such a request is also inconsistent with CCTV evidence being withheld.

103. As to CCTV footage allegedly being deleted or tampered with, I have to consider which scenario is more likely: that all available CCTV footage was shown to Mr Nyamadzawo, or that one or more of the Respondent's employees deleted or tampered with CCTV footage. Beyond Mr Nyamadzawo's assertion, there is no evidence to support this serious allegation that material evidence has been destroyed or doctored. I prefer the Respondent's evidence that Mr Nyamadzawo was shown all available CCTV. I conclude the reason there is no CCTV showing him checking the ramp is because he didn't check the ramp.

Individuals Working Against Mr Nyamadzawo

104. I am not satisfied that there is anyone working against Mr Nyamadzawo. He said the people working against him were Ms Patel, Mr Taf and unnamed engineers. I note Mr Nyamadzawo could not name the engineers who are said to be working against him. There is nothing in the 16th to 19th June 2023 e-mails to suggest that engineers involved in those exchanges are working against Mr Nyamadzawo. Moreover, if he doesn't know who the engineers are, and he has provided no reason why they would be working against him, I consider it unlikely that they are working against him as he claims.
105. As to Ms Patel working against him, Mr Nyamadzawo states this was because she was angry that he hadn't informed her he was applying for promotion. But again, no reason is given why that would anger her. I note Ms Patel asked for Mr Nyamadzawo's promotion to be paused pending the disciplinary, but on its own, that does not indicate any ill-intent. Furthermore, there is nothing unusual about pausing someone's promotion pending the outcome of disciplinary proceedings, particularly where the allegation is of gross misconduct.
106. Finally, as regards individuals working against him, Mr Nyamadzawo named Mr Taf. The basis of this belief is that Mr Taf was not the union representative assigned to the Walworth garage where Mr Nyamadzawo worked. Mr Nyamadzawo states Mr Taf was "*inserted*" by the Respondent. However, I note Mr Nyamadzawo's e-mail sent to Ms Johnson on 27th June 2023 refers to Mr Taf being his union representative. This is more consistent with Mr Nyamadzawo arranging for Mr Taf to represent him. It is not consistent with Ms Patel inserting Mr Taf into the disciplinary process, or Ms Patel otherwise being involved in Mr Taf acting as his representative.

Inaccurate Written Records

107. Mr Nyamadzawo complained the Respondent's written notes of the investigation

meeting and the disciplinary and appeal hearings were inaccurate. The inaccuracies he identified are at paragraphs 109 to 114 below.

108. Despite Mr Nyamadzawo's complaints, I find that these records provide an accurate and complete account for the following reasons.
109. Firstly, Mr Nyamadzawo criticises the record of the investigation meeting. He says Ms Johnson only asked him whether he checked the ramp, but her notes claim she asked whether the FUC was completed. Ms Johnson's typed record of the meeting she sent to Mr Nyamadzawo was in the hearing bundle. Ms Johnson prepared it from her contemporaneous notes. So it is more likely than not that her contemporaneous notes would be an accurate record of what was discussed. In any event, if Ms Johnson had only asked Mr Nyamadzawo if he checked the ramp, that would not make the dismissal unfair, because Ms Patel made the dismissal decision. Therefore, if Ms Johnson's written record was inaccurate in that respect, which I have already found it was not, that inaccuracy would not make the dismissal unfair.
110. Furthermore, when Ms Johnson e-mailed the written record to Mr Nyamadzawo on 27th June 2023, he raised a number of queries regarding the investigation and the meeting, but he did not question the accuracy of the written record Ms Johnson provided. Yet further, Ms Johnson's written record shows that she asked Mr Nyamadzawo about the ramp specifically, and also about the FUC more generally. It's therefore more likely that Ms Johnson asked Mr Nyamadzawo about both, as set out in her written record, and Mr Nyamadzawo may have simply forgotten that she also asked about the FUC as well as asking about checking the ramp.
111. Mr Nyamadzawo says Ms Johnson failed to record that he asked for additional CCTV during the investigation meeting. I accept that Mr Nyamadzawo requested additional CCTV in his e-mail sent on 27th June 2023, but that was written after the investigation meeting. There is nothing to support his account that he requested additional CCTV during the meeting. I also note that while he requests additional CCTV in his e-mail, he does not mention having previously requested additional CCTV. His e-mail is more consistent with him requesting additional CCTV for the first time, rather than him having requested additional CCTV, which has not been provided, necessitating him making a further request.
112. Finally, as regards inaccuracies in the minutes of the investigation meeting, Mr Nyamadzawo states he told Ms Johnson that he had checked the ramp, but this isn't recorded. I do not accept that Mr Nyamadzawo told Ms Johnson this: had he done so, I would expect her to have recorded it in the minutes. And if she had failed to record something so highly relevant in the minutes, Mr Nyamadzawo would have raised that important omission in his 27th June 2023 e-mail, which he did not.
113. Mr Nyamadzawo complains that Ms Patel's written record of the disciplinary hearing fails to show he requested additional CCTV footage. It's evident Mr Nyamadzawo requested additional CCTV in his e-mail to Ms Johnson sent on 27th June 2023. It's also common ground that Ms Patel had obtained additional

CCTV footage during the disciplinary hearing, as stated in the written record. This is consistent with Mr Nyamadzawo requesting additional CCTV footage, Ms Patel consequently checking if further CCTV evidence was available. She found there was, and they viewed it during the disciplinary hearing. If Mr Nyamadzawo had requested even more CCTV during the disciplinary hearing, and his request was ignored, I consider he would have raised the failure to provide yet more footage in his grounds of appeal. The fact that he did not raise it in his grounds of appeal leads me to conclude he did not request it during the disciplinary hearing. Therefore, I find the absence of any reference to Mr Nyamadzawo requesting additional CCTV footage in the record of the disciplinary hearing is because he did not request this. I do not find the absence of such a reference is due to an inaccuracy in the written record.

114. The final inaccuracy Mr Nyamadzawo highlighted is he says that Ms Murphy told him during the appeal hearing that she did not need to show anyone the CCTV, but she failed to record this comment in her written record of the appeal hearing. According to her record, Ms Murphy dealt with the CCTV a few times during the appeal hearing. Firstly explaining the reason the Respondent initially checked the CCTV was to close off the defective ramp reported on 10th June 2023. Secondly, in her opinion the CCTV showed Mr Nyamadzawo had not completed the FUC. Thirdly, explaining additional CCTV had been obtained from the garage CCTV which was watched during the disciplinary hearing. Fourthly, explaining that Ms Patel had also checked the CCTV at Victoria station during the disciplinary hearing. Ms Murphy dealt with all relevant aspects of the CCTV evidence, and telling Mr Nyamadzawo she didn't have to show anyone the CCTV would be unnecessary. Therefore, I find the absence of this comment in the record of the disciplinary hearing is because Ms Murphy did not say it. I do not consider that reflects any inaccuracy or incompleteness in the written record.

Other Grounds of the Claim

115. Mr Nyamadzawo's complaints that the process followed was unfair is dealt with at paragraphs 137 to 143 below, and his complaint that the sanction imposed was unduly harsh is dealt with at paragraph 144 below.

THE LAW

116. I have applied the following law in this case.

Unfair Dismissal

117. Where it is admitted or it is found that an employee has been dismissed, an employer must show the reason for the dismissal was one that was potentially fair as set out in section 98(2) of the Employment Rights Act 1996.
118. According to 98(2)(b) of the 1996 Act, dismissal due to an employee's conduct is a potentially fair reason.
119. Where the employer has shown the reason for dismissal is potentially fair, the Tribunal must consider those matters set out at section 98(4), namely whether

the dismissal is fair or unfair.

120. To assess fairness, section 98(4)(a) requires the Tribunal takes into account whether the employer acted reasonably or unreasonably having regard to the employer's size and administrative resources.
121. The assessment of fairness also requires consideration of the following:
 - 121.1 Whether the employer had a genuine belief in the employee's guilt;
 - 121.2 Whether there are reasonable grounds for the employer's genuine belief;
 - 121.3 Whether that belief is as a result of a reasonable investigation; and
 - 121.4 Whether that belief provides sufficient reason for the dismissal.
122. When considering reasonableness under paragraphs 122.2 to 122.4 above, the Tribunal must consider whether the employer's actions were within the band of reasonable responses open to an employer in the circumstances.

Wrongful Dismissal

123. Where an employee is dismissed, they are entitled to the notice period set out in their contract of employment, providing the contractual period is not less than the notice period at section 86 of the Employment Rights Act 1996.
124. If there is no contractual provision, or the contractual provisions is less than the notice period at section 86 of the 1996 Act, the employee is entitled to the notice period in that section.
125. However, as a result of section 86(6) an employee who is dismissed for gross misconduct, may be dismissed without the employer giving any notice at all.

Holiday Pay

126. Did the Respondent fail to pay Mr Nyamadzawo for annual leave he had accrued but not taken when his employment ended?

CONCLUSIONS

127. I have applied the above law to the findings of fact that I have made in order to reach the conclusions below.

Unfair Dismissal

128. I find the Respondent has discharged the burden of proving that the reason or principal reason for dismissing Mr Nyamadzawo was because it concluded he was guilty of misconduct for failing to check the ramp on 11th June 2023, and thereby failing to complete the FUC. Also, that by completing the VCR on 11th June 2023 stating the FUC had been completed, he falsified the record.

129. The e-mails exchange between 16th to 19th June 2023 show the Respondent wanted to establish whether the defective ramp reported on 10th June 2023 could be closed off. These e-mails pre-date the investigation, and in fact they triggered the investigation. The investigation, the disciplinary hearing and the appeal hearing all focussed on whether the ramp had been checked as part of carrying out the FUC. I therefore accept this was the reason or principal reason for Mr Nyamadzawo's dismissal.
130. I do not accept Mr Nyamadzawo was dismissed because there were individuals working against him. He has given no reason why the unnamed engineers and Mr Taf would be working against him. As for Ms Patel working against him because he applied for a promotion without informing her, I see no reason why that would motivate her to work against him. Furthermore, the written record of the disciplinary hearing, which I accept as accurate, shows broadly speaking, Ms Patel conducted the hearing fairly. She appropriately questioned Mr Nyamadzawo, made enquiries, obtained and considered further CCTV, before reaching her decision. The manner in which Ms Patel conducted the disciplinary hearing satisfies me that she had no ulterior motive.
131. I have also found, Mr Nyamadzawo did not check the ramp, and therefore did not complete the FUC, so he falsely signed the VCR claiming to have carried out the FUC when he hadn't done so.
132. Therefore, in the event the Respondent's reason for dismissing Mr Nyamadzawo was not the failure to check the ramp, I alternatively consider falsifying the VCR is the reason or principal reason for his dismissal. Ms Patel refers to this in their dismissal letter, Ms Murphy upholds Ms Patel's decision, and it is a serious failure, and specified as gross misconduct in the disciplinary procedure.
133. As I have found that Mr Nyamadzawo was dismissed for failing to carry out the FUC, this amounts to a conduct dismissal. My alternative finding that Mr Nyamadzawo was dismissed for falsifying the VCR by signing it claiming the ramp was checked, is also based on his conduct. By 98(2)(b) of the 1996 Act, dismissal due to misconduct is a potentially fair reason. Accordingly, the reason for Mr Nyamadzawo's dismissal is a potentially fair reason.
134. I find the Respondent genuinely believed Mr Nyamadzawo had failed to carry out the FUC. Throughout the disciplinary process, from the investigation up to the appeal hearing, Mr Nyamadzawo's position was either that he could not recall whether he carried out the FUC, although during the written record of the appeal hearing states he accepted that he did not carry out the FUC. Furthermore, there was no CCTV recording showing Mr Nyamadzawo carrying out the FUC, and if he had done so there would be a recording showing him doing so. With the evidence supporting a conclusion that Mr Nyamadzawo did not carry out the FUC, I conclude the Respondent genuinely believed he had failed to do so. Additionally, I have found no evidence of an ulterior motive for dismissing Mr Nyamadzawo, which supports my conclusion that the stated reason for his dismissal is a genuine reason.

135. I also find that there were reasonable grounds for the Respondent's belief that Mr Nyamadzawo failed to carry out the FUC. Firstly, he is not seen checking the ramp in the CCTV. Secondly, CCTV shows him switching on the engine and moving off around 20 seconds later, which is insufficient time to carry out the FUC. Thirdly, during the disciplinary process, Mr Nyamadzawo mostly said he couldn't recall whether he checked the ramp, but during the appeal hearing confirmed he did not check the ramp. Furthermore, Mr Taf and Mr Green both mitigated on the basis that Mr Nyamadzawo had not checked the ramp. In my judgment, these are reasonable grounds for the Respondent believing Mr Nyamadzawo did not check the ramp.
136. The above are also reasonable grounds for the Respondent believing that when Mr Nyamadzawo signed the VCR claiming the FUC had been completed, he falsified the VCR.
137. I consider the Respondent carried out a reasonable investigation. I have taken into account that the Respondent has approximately 2,600 employees, with corresponding HR resources. I have also taken into account that there was a fact-finding meeting, disciplinary and appeal hearings. Although Mr Nyamadzawo was the only person interviewed, there was no one else who could have provided useful information. The Respondent had checked such CCTV footage that was available, which was CCTV from the bus, from the garage, and when Mr Nyamadzawo arrived at Victoria station. Ms Murphy conducted further enquiries as part of the appeal process.
138. I remind myself that it's not necessary for the Respondent to carry out CID style enquiries, nor to investigate every conceivable point of enquiry. It is sufficient that the Respondent's investigation was within a reasonable range of responses, which I find it was.
139. I also find that the disciplinary process was reasonably fair. After the investigation meeting Mr Nyamadzawo was informed there was a case to answer on an allegation of gross misconduct because he failed to carry out the FUC, and he was informed if the allegation was proved he may be summarily dismissed. He was informed that he could be represented by a trade union representative, which in fact he was. Despite the matters dealt with at paragraphs 151 to 155 below, I consider Mr Nyamadzawo had sufficient time to prepare for the disciplinary hearing. Mr Nyamadzawo's complaint regarding holiday pay is that he prepared for the disciplinary hearing while he was on leave, it is not that he had insufficient time to prepare.
140. Mr Nyamadzawo also had an opportunity to appeal against the original dismissal decision, when again, he was represented by his trade union. At the appeal hearing, he was given an opportunity to elaborate on his grounds of appeal.
141. I do not consider there is anything sinister about the missing 10th June 2023 VCR. I accept the Respondent is simply unable to find it.
142. I do not consider it was appropriate for Ms Patel to rely on the alleged avoidable collisions as this had not been put to Mr Nyamadzawo before the disciplinary

hearing. However, I consider it unlikely she would have reached a different decision had she disregarded the collisions, because the failure to carry out the FUC is stated to be gross misconduct in the Respondent's disciplinary policy. The disciplinary policy also states that falsifying records amounts to gross misconduct.

143. Alternatively, to the extent Ms Patel's decision to dismiss was unfair as a result of her reference to the collisions, I consider that would be cured by the appeal process. I have found the appeal hearing was conducted fairly. Mr Nyamadzawo's only criticism of the appeal hearing is he claims Ms Murphy stated she had a right to withhold CCTV footage, and I have found Ms Murphy did not say that.
144. Finally, as regards whether the dismissal was fair or unfair, I have considered whether the sanction of summary dismissal was within a range of reasonable responses. In my judgment, summary dismissal was a reasonable sanction. I take into account that the failure to carry out an FUC and falsifying records are both expressly stated to be acts of gross misconduct. The former could affect the Respondent's operating licence, and could therefore have serious consequences. The latter was a legal document, so to falsely sign claiming the FUC had been completed, was a breach of the trust the Respondent placed in Mr Nyamadzawo, which justifies his summary dismissal.
145. Taking into account all the circumstances of this case, and having regard to the range of reasonable responses available to an employer, I find the Respondent acted reasonably in summarily dismissing Mr Nyamadzawo. I therefore find that the dismissal was fair.

Wrongful Dismissal

146. As to whether Mr Nyamadzawo's dismissal was a wrongful dismissal, I consider it was not for the reasons set out at paragraphs 147 to 150 below.
147. Firstly, by clause 19 of Mr Nyamadzawo's employment contract, the Respondent was entitled to dismiss him without notice if he was guilty of gross misconduct.
148. It is common ground that Mr Nyamadzawo was summarily dismissed.
149. For the reasons stated at paragraphs 84 to 95 above, I find there was sufficient evidence to satisfy the Respondent that Mr Nyamadzawo was guilty of gross misconduct.
150. Accordingly, pursuant to clause 19 of his contract and section 86(6) of the Employment Rights Act 1996, the Respondent was entitled to summarily dismiss Mr Nyamadzawo. Therefore, he was not wrongfully dismissed.

Holiday Pay

151. The basis of Mr Nyamadzawo's holiday pay claim is that he received Ms Johnson's letters dated 26th June 2023 while he was on annual leave.

Furthermore, because the disciplinary hearing was on 6th July 2023, which was his first day back from annual leave, he had to prepare for the disciplinary hearing while he was on annual leave.

152. From Mr Nyamadzawo's perspective, I understand why he found this timing to be unsatisfactory. It was inevitable that Mr Nyamadzawo would at least need to read Ms Johnson's letters and other attachments while he was on annual leave, which I consider to be unfortunate. I also do not consider Mr Nyamadzawo had expressly agreed to this. He had agreed that for the disciplinary hearing to be held after he returned from annual leave, but he did not expressly agree for it to be held almost immediately after he returned.
153. However, I note that in responding to Ms Johnson's 27th June 2023 e-mail, Mr Nyamadzawo did not ask for the disciplinary hearing to be postponed, nor did he ask for his annual leave to be cancelled or altered. Although Mr Nyamadzawo said he cancelled his holiday, he did not cancel his annual leave.
154. Furthermore, although he read the documents and did some preparation for the disciplinary hearing while he was on annual leave, he did take the annual leave. So, it was open to the Respondent to conclude that Mr Nyamadzawo had no objection to the date and time of the disciplinary hearing, and to therefore conclude it did not interrupt his annual leave in a material way.
155. In the circumstances, Mr Nyamadzawo's claim for holiday pay relates to annual leave which he did in fact take. Accordingly, he has failed to show the claim for holiday pay relates to annual leave accrued but not taken at the date his employment ended. I therefore dismiss the claim for holiday pay.

Employment Judge Tueje
Date: **27th June 2024**

Judgment sent to the parties and entered in the Register on: **2nd July 2024**

for the Tribunal Office