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Case No: EA-2021-000039-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 January 2023

Before :

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

LONDON UNITED BUSWAYS LIMITED	**Appellant**
- and -	
MR STEVEN HARRY	**Respondent**

- -
- -

Mr Edward Nuttman (of Ward Hadaway LLP) for the **Appellant**
Mr Steven Harry the **Respondent** in person

Hearing date: 25 January 2023

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL; PRACTICE & PROCEDURE

The Employment Tribunal decided that the Claimant's dismissal was unfair for reasons that had not been raised in the evidence or during the argument at the hearing of the claim. The Respondent had not had a sufficient opportunity to deal with those matters. There were points that the Respondent might have advanced in order to address them. The Employment Tribunal's judgment was set aside, and the claim of unfair dismissal remitted for rehearing.

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In this judgment, I shall refer to the parties as they were in the Employment Tribunal, that is as "the Claimant" and "the Respondent".

2. This is an appeal by the Respondent against the Reserved Judgment of the Employment Tribunal sitting at Watford (Employment Judge Cowen, sitting alone). There was a hearing by Cloud Video Platform on 7 and 8 January 2021. The Judgment was signed by the Employment Judge on 24 February 2021 and was sent to the parties on 24 March. The Employment Judge found that the Claimant had been unfairly dismissed by the Respondent and ordered the payment of compensation comprising a basic award of £9,906 and a compensatory award of £20,368. The Judgment was accompanied by Written Reasons running to 56 paragraphs over 9 pages.

3. The Respondent appeals against the Employment Judge's findings both in relation to liability for unfair dismissal and, in relation to remedy, on contributory fault. The appeal was permitted to proceed to a full hearing on revised Grounds of Appeal by HHJ James Tayler, following a preliminary hearing.

4. On this appeal, the representation is as it was below. The Respondent has been represented by its solicitor, Mr Edward Nuttman. The Claimant appears as a litigant in person. I am very grateful to them both for their submissions. In particular, I am grateful to the Claimant for the constructive and realistic way in which he approached the appeal and for his frankness in answering fully the points which I raised with him during argument.

5. Prior to the start of the hearing, having considered the written submissions of Mr Nuttman, I

took the view that it was appropriate to draw the parties' attention to the principles set out at paragraph 55.10 of **Tolley's Employment Handbook** in relation to the procedure for misconduct dismissals, as it appeared to me that issues were being raised regarding the framing of disciplinary charges which might require consideration of a number of authorities set out in that passage, including **Strouthos v London Underground Ltd** [2004] EWCA Civ 402, [2004] IRLR 636; and **Brito-Babapulle v Ealing Hospital NHS Trust** [2014] EWCA Civ 1626. In the event, for reasons which I shall come on to, it is not necessary for me to address those authorities, or the principles set out in them, in any detail.

Background

6. I will now set out the factual background as it appears from the Employment Tribunal's Written Reasons.

7. The Respondent operates a number of bus routes in Greater London. The Claimant was, at the time of his dismissal, an Operations Manager who had worked for the Respondent since 2009. He had also been employed by the Respondent in other roles previously and had a total of more than 40 years' experience in the public transport industry.

8. The Claimant worked at the Respondent's bus garage in Park Royal in North West London. As Operations Manager, he had responsibility for the day to day operation of bus services including drivers and controllers. His job description, to which I was taken during the appeal hearing, specifically required him to ensure compliance with the Respondent's health and safety procedures and the reporting of accidents and defective equipment.

9. On 16 October 2018, the Claimant was informed that one of the buses at the garage had been reported to the engineers with a bald tyre. He inspected the tyre and was shocked at its poor

state. The Claimant initially believed the tyre was defective. However, he also requested the records of inspections of the vehicle by drivers who had been taking it out on shift. Bus drivers at the garage were required to perform a "first use check" prior to taking vehicles out. The records showed the bus had been driven by experienced drivers whom the Claimant believed would have carried out those checks competently. The Claimant requested CCTV footage from the previous seven days in order to ensure that proper inspections had been carried out before the bus left the garage. He also asked the Engineering Manager to check whether a steering problem with the particular bus may have led to wear on the tyre.

10. The Claimant drafted an email to his own line manager, Mr Ray Clapson, to inform him of the incident. He went to see the Engineering Manager for an update before sending it. The Engineering Manager told the Claimant the steering on the vehicle was very wrong. The Claimant took the view that this was an isolated incident. However, on returning to the office he forgot to finalise the email to Mr Clapson and did not send it.

11. On the next day, 17 October 2018, the Claimant carried out a routine inspection of first use checks. He looked at the checks carried out by four drivers and discovered that two of them had not been completed properly. He reminded the drivers how to carry out the checks. Also on 17 October, Mr Clapson visited the garage. He discussed a number of issues with the Claimant, although the Claimant did not raise the issue of the defective tyre with him or his investigation into its cause.

12. On 19 October 2018, the Claimant was not at work. Mr Clapson contacted him to ask him what he knew about the defective tyre. The Claimant told him that CCTV had been requested and the fault with the tyre was being investigated.

13. The Claimant returned to work on 22 October 2018, which was a Monday. Mr Clapson asked to interview him about the incident with the tyre. He told the Claimant it was a formal interview and at the end of the conversation the Claimant was suspended. During the interview, Mr Clapson told the Claimant that five buses at the garage had been found to have defective tyres following an inspection which he had requested. Mr Clapson made a typed record of the interview with the Claimant and the other matters which he investigated. It was headed, "Steve Harry Fact-Finding Interview." I was shown a copy during the appeal hearing. At the outset, the note records that Mr Clapson told the Claimant he was undertaking "a formal fact-finding concerning the tyre found on OV61" (this was a reference to the particular bus on which the defective tyre was found on 16 October). Mr Clapson asked the Claimant where and how he had become aware of the defective tyre, what the Claimant had done and why he had not told Mr Clapson about it. The Claimant explained what happened and told Mr Clapson he had intended to send an email, but it had not been retained on his computer. The Claimant told Mr Clapson he was waiting for the CCTV in relation to the drivers who had apparently not completed a proper first use check. Mr Clapson said that he had asked for checks to be done and that five tyres had to be replaced on other buses. At the conclusion of the interview Mr Clapson told the Claimant that "doing nothing is I believe a fundamental failure in your role" and that he was suspended from duty on full pay because of the seriousness of what had happened.

14. Mr Clapson wrote a report to his own managers. He set out what he had done after finding out about the defective tyre. His conclusion was as follows:

> **"I conclude that Mr Harry having completed a first use check on four drivers the day after the event and discovering a 50% failure, the fact that he did nothing is a fundamental failure as a CPC holding Operations Manager. By his inaction buses that had not been checked correctly were able to be driven on the public highway and drivers that clearly were not completing checks allowed to carry on without any guidance which put the company's O licence and good repute in jeopardy. It is clear by the state of tyre that checks had not been completed correctly so why would you wait for CCTV evidence to confirm what is already obvious when immediate action is clearly needed."**

The reference to the company's "O licence" was to its Operating Licence and that to the Claimant holding a "CPC" was to a Certificate of Professional Competence in relation to his role.

15. I note that the criticism of the Claimant in Mr Clapson's report was for not taking immediate action after his discovery that two of four drivers inspected by him on 17 October had not been completing checks properly and also for waiting to receive the CCTV footage of the first use checks in relation to the bus with the defective tyre on 16 October before taking action.

16. On 26 October 2018, the Claimant was invited by the Respondent to a disciplinary hearing to take place on 1 November. The charge against the Claimant was (as set out by the Employment Judge and as repeated in the dismissal and appeal letters) of failing to complete his duties as an Operation Manager in relation to the discovery of a defective tyre, by not communicating the issue and by his inaction, allowing vehicles (the plural being used) to be driven without proper first use checks or possible serious defects.

17. The Employment Judge set out the conclusions of Mr Allan Southgate, the dismissing officer who conducted the disciplinary hearing, as follows:

> **16. Mr Southgate concluded that this was a very serious offence and that there had been a lack of investigation by the Claimant, as well as a failure to inform Mr Clapson. The letter of dismissal outlined that the Claimant had carried out an investigation that involved detailed analysis of log cards and duty cards against the 24 hour sheets. It also stated that the Claimant had carried out his usual run out checks on Tuesday and requested CCTV footage as well as a report from the driver involved. However it went on to say that Mr Southgate believed that the Claimant should have carried out a "full investigation". This was not defined in any way in the letter. It became clear in the oral evidence that a full review of all the buses in the depot, together with checks on the relevant drivers was expected. The dismissal letter acknowledged that the Claimant had spent a whole day matching the drivers to their sheets, it described his carrying out four first driver checks as "a disappointing response." It also acknowledged that requesting the CCTV was the correct response but said that he had done little whilst waiting for the CCTV to become available.**
>
> **17. Mr Southgate outlined that the Claimant had failed to call Mr Clapson and provided no evidence of the email he said he had drafted. He believed that**

> **the Claimant had given no urgency or thought to the possible outcome of the investigation, showing a lack of understanding of the gravity of the situation. Nor had he checked the vehicle immediately. He also thought that the check which the Claimant carried out with regard to the drivers was inadequate and should have led to an escalation in the situation. Mr Southgate concluded that the failure to instigate a fleet check was irresponsible.**
>
> **18. Mr Southgate concluded that the appropriate action was a matter which warranted summary dismissal. The letter does not outline what was taken into account in deciding the penalty other than "all the information presented today, your length of service." In evidence, he stated that he felt that the issue was one of trust and that he could no longer trust the Claimant to carry out such a role.**
>
> **19. Mr Southgate acknowledged that of the four drivers who took out the bus in the days leading to the incident, only two were disciplined and they had not been dismissed.**

18. The Claimant appealed against his dismissal. The appeal was heard on 28 November 2018 by two other managers employed by the Respondent, Mr Andy Evans and Mr Jon Sweet. They heard evidence from the Engineering Manager and also from the Claimant. The Claimant highlighted that he was dealing with a number of problems at the garage and advanced personal mitigation. After considering their decision, the appeal panel reconvened on 3 December 2018 when they told the Claimant that they were upholding Mr Southgate's decision to dismiss.

19. Following the failure of his internal appeal, the Claimant brought a claim in the Employment Tribunal on 17 February 2019.

The Employment Tribunal's Decision

20. Returning to the Employment Judge's reasons, there is no criticism by either party of the Employment Judge's statement of the law applicable to unfair dismissal cases, at paragraphs 22 to 26 of the Written Reasons, which was as follows:

> **22. The Tribunal must consider whether the dismissal was unfair. In doing so they consider the following issues in accordance with section 98 Employment Rights Act 1996 and <u>BHS v Burchell</u> [1978] ICR 33;**
>
> **(a) What was the principal reason for the dismissal and was it a potentially**

fair reason in accordance with section 98 of the Employment Rights Act 1996? The Respondent asserts that it was a reason relating to the Claimant's conduct.
(b) Was the dismissal fair in all the circumstances in accordance with equity and the substantial merits of the case (and section 94 of the Employment Rights Act 1996)?
(c) Did the Respondent have a genuine belief in the misconduct which was the reason for the dismissal?
(d) Did the Respondent hold that belief in the claimant's misconduct on reasonable grounds?
(e) Did the respondent carry out a reasonable investigation in all the circumstances?
(f) It is also contended by the claimant that an unfair procedure was followed.

23. In accordance with <u>Iceland Frozen Food v Jones</u> [1982] IRLR 439 whether the decision to dismiss was a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer.

24. It is not necessary to consider whether the appeal was a review or a rehearing as <u>Taylor v OCS Group Limited</u> [2006] IRLR 613, CA indicated that what is important is that the procedure was fair overall. It also sets out that an appeal can correct any defect in the initial investigation or procedure.

25. If the dismissal was unfair, the Tribunal must consider whether the claimant caused or contributed to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?

26. The Tribunal should also consider if the dismissal was procedurally unfair, whether an adjustment should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed? <u>Polkey v AE Dayton Services</u> [1987] UKHL 8.

21. Paragraphs 27 to 48 of the Written Reasons contain the operative part of the Employment Judge's reasoning on the fairness of the Claimant's dismissal, which was as follows:

<u>The Decision</u>

27. The Claimant was dismissed for an issue of conduct - namely the failure to inform his manager of the incident and a failure to carry out an investigation in the manner which management required. This is a potentially fair reason for dismissal.

28. I conclude that Mr Southgate did have a genuine belief in part of the reason for the Claimant's dismissal. His belied was that the Claimant had not informed Mr Clapson of the incident. As the Claimant's line manager, it was appropriate for him to be informed and the Claimant acknowledged this. Mr Southgate also believed that the Claimant should have acted differently in the way in which he handled the situation. Namely by acting more quickly to ensure

that the drivers and all the other vehicles were checked to establish that there were no other defective tyres being taken out on the road.

29. The letter of dismissal outlined the belief of Mr Southgate that the Claimant had failed to carry out a "full investigation", but did not specify what that should have involved. The Claimant's witness statement made reference to an ulterior motive by Mr Clapson with regard to the Claimant's dismissal, but there was no evidence to support the theory that this had influenced Mr Southgate in any way.

30. The issue of whether Mr Southgate had reasonable grounds for his belief is the more finely balanced aspect of this case. Mr Southgate based his decision on the investigation carried out by Mr Clapson, the evidence of which showed that the Claimant had taken steps to identify the nature of the problem and whether the issue could and should have been discovered at an earlier point (i.e. by drivers not doing their first use checks properly).

31. However, Mr Clapson's investigation appears to have gone on to consider whether the Claimant had taken sufficient steps bearing in mind he found that two of the four drivers he saw the next day did not carry out their first use checks appropriately. this was a point which Mr Clapson and Mr Southgate relied upon, but was a direct result of the incident, but rather a routine check. The Claimant's lack of response to this finding was criticised by both Mr Clapson and Mr Southgate. But this was not a matter which was the subject of the allegations in the disciplinary letter inviting the Claimant to the meeting.

32. There was no evidence produced to the Tribunal to indicate that the Claimant had been trained, or told by way of a policy or procedure, how to investigate this particular type of incident. He was trusted by the Respondent to carry out the investigation as he saw fit and using his expertise and his experience. The Respondent has asserted that the investigation carried out by the Claimant was insufficient and did not give the incident the appropriate level of severity, but has not shown that the Claimant had been trained or informed of an expected standard.

33. The Claimant did start an investigation. He followed what his experience told him was a reasonable line of enquiry, i.e. that the tyre and/or bus were defective. He therefore ensured that steps were taken to identify whether this was correct.

34. The Claimant also called for the CCTV in order to check whether the information given to him; that the drivers had carried out their first use checks, was reliable.

35. Mr Southgate therefore based his decision on his disapproval of the Claimant's handling of the situation. The Claimant had not been trained to handle the situation in any specific manner. The basis for the decision was therefore Mr Southgate's subjective view and not the objective evidence of what had happened.

36. Mr Southgate believed that the Claimant had failed to react to this situation with the appropriate level of severity and had missed opportunities to

report it to Mr Clapson. In doing so he believed that he had allowed other potentially dangerous situations to persist unnoticed. The subsequent investigation by Mr Clapson had uncovered another five buses with defective tyres. However, these were not part of the allegation with respect to the Claimant.

37. Mr Southgate's belief that the Claimant failed to tell his manager was based on the evidence. His belief that the Claimant had by his inaction allowed the vehicle to be driven on the public highway without proper first use checks with possible serious defects was based on the subsequent inspection which showed that other buses also had defects. However, it was not a requirement in such a situation that the Claimant carry out the checks on other buses and the Claimant believed that the problem was specific to this bus. It was Mr Clapson and Mr Southgate's preference that he should have widened the investigation. That decision was not therefore a reasonable belief as it was based upon a subjective, personal opinion of Mr Southgate.

38. The process applied by the Respondent in this situation was adequate in that the Claimant was interviewed, invited to a hearing, told of the allegation against him and the possible consequences and offered the opportunity to be accompanied. Unfortunately he was not shown the documents in advance of the hearing, but some time was given to allow this error to be rectified. The Respondent did not allow the Claimant to read out his prepared statement during the disciplinary hearing. However, the Claimant did not make an issue of this and was allowed to refer to it during the course of the meeting and hence it would appear that no disadvantage or unfairness occurred.

39. Having decided that the Claimant was to blame for his conduct, Mr Southgate went on to decide that this amounted to a gross misconduct. I must consider whether the decision to dismiss was within the band of reasonable responses. Mr Southgate was aware of the Claimant's previous record with the company, his long service and his personal circumstances. He was also aware that the Claimant had taken some steps to investigate the incident. He also knew that no harm had occurred as a result of the incident, nor had the company had any penalty from the licensing authority. Mr Southgate's evidence showed that he disapproved of the Claimant's stance of defending himself and indicating he would appeal. I am of the view that it was this point which influenced Mr Southgate to conclude that the Claimant should be summarily dismissed and not as he suggested, the fundamental nature of his breach.

40. The Claimant appealed his dismissal which was an opportunity to rectify any mistake which had been made by Mr Southgate.

41. Mr Evans's evidence of the appeal indicated that he did not consider the Claimant's actions to be sufficient, he described that "it looked like no actions had been taken." This is clearly inaccurate and shows a failure to take account of the evidence which was before him.

42. Mr Evans also said that he asked the Claimant at the appeal if the drivers had been trained and he said that they had. On asking more detailed questions, it became apparent that the Claimant admitted that he had not kept up to date records of the training of the drivers. Mr Evans felt that this provided the

Claimant with a motive for not carrying out a full investigation of the tyre incident and led to his lack of trust in the Claimant.

43. The Claimant raised the issue of the discrepancy with regard to how he had been treated in comparison to the drivers whom Mr Southgate and Mr Evans both considered culpable. Whilst it is noted that they were not dismissed for their actions, this cannot be directly comparable to the dismissal of the Claimant, as his responsibilities were not the same.

44. The appeal outcome statement in the bundle referred to the disciplinary procedure example of gross misconduct as "failure to observe the Company's rules/procedures or reasonable instructions relating to employment, including those affecting health and safety of staff or the public." The Respondent has not shown any company rule, procedure or instruction given to the Claimant on how to handle or investigate an issue of a defective tyre. Mr Evans refers in the summary to "you are responsible for the health and safety of your staff and their passengers, by this I mean ensuring that complete and competent first use checks are carried out on our buses before they enter service." This indicates that Mr Evans was considering a different and wider issue than how the Claimant investigated the incident on 16 October 2019 [sic]**.**

45. The evidence also shows that the Claimant expressed remorse at the appeal by saying he "made a poor judgment call" and also raised issues of mitigation in terms of his workload; points which Mr Evans asserted that he took into account, but which are not reflected in his decision that the Claimant could not be trusted to act appropriately in the future.

46. The personal views of the appeal officer appear to have been relied upon in making a decision as to whether the Claimant's actions were within the terms of his job description. It is my view that Mr Evans took into account issues and evidence beyond that which was the focus of the initial reason that the Claimant was suspended and investigated. He also took into account evidence about the Claimant's record keeping in terms of first use checks which the Claimant had not had time or reasonable opportunity to refute.

47. The appeal therefore did not rectify any of the mistakes of the disciplinary hearing, but compounded them, by upholding the dismissal for reasons which were not related to the allegation and for not taking into account evidence which was relevant. The Respondent imposed standards on the Claimant in the disciplinary hearing which had not been set out to him in training, policies or procedures. It was therefore not within a band of reasonable responses to dismiss him for failing to achieve such standards.

48. I conclude that the Claimant was unfairly dismissed for the reasons outlined above.

22. The Employment Judge then went on to consider whether the Claimant would have been dismissed by the Respondent in any event, had a fair process been followed. Her conclusion, which neither party has separately challenged on appeal, was:

> **49. The issue of whether, had a fair process been followed, the Claimant would have been dismissed by this Respondent in any event, must be considered. Had the Respondent limited the investigation to consideration of what the Claimant did do and what had the Claimant been instructed and/or trained to do, then it is still possible that the Respondent would have dismissed the Claimant. This is because, the investigation uncovered other issues with the Claimant's work which did not meet the standards required of him. Had those been brought to the disciplinary hearing in an appropriate and fair manner, then it is possible that the Respondent would have dismissed for those reasons. I find that there is a 50% chance that this would have occurred.**

23. The Employment Judge then addressed the issue of contributory fault. She declined to make any reduction in the award of compensation on this basis. The reasons she gave were:

> **50. I am also asked to consider the issue of contributory fault. That is whether the actions of the Claimant prior to his dismissal contributed to that outcome. I do not consider that they did. The Claimant instigated an investigation which he believed would reveal the reason for the defective tyre. Both Mr Southgate and Mr Evans refer to a number of steps which he took. The criticism levelled at him by his superiors is that he did not act quickly enough and raise the issue to a level of seriousness which they deemed appropriate. That does not mean that the Claimant did nothing, he clearly did start an investigation. He was not able to continue or complete it due to his suspension.**

24. The Employment Judge then went on at paragraphs 51 to 56 of the written reasons to set out her calculation of the remedy due to the Claimant on the basis that he had been unfairly dismissed and that a 50 per cent reduction should be applied on a **Polkey** basis, as she had determined at paragraph 49. The resulting award was £9,906 in respect of the basic award and £20,368 in respect of the compensatory award. Neither party has separately challenged the assessment of loss on appeal.

The Appeal

25. The appeal by the Respondent against the finding of unfair dismissal is advanced by Mr Nuttman on a number of bases. The fundamental aspect of his criticism of the Employment Judge's decision is that two of the issues relied on by the Judge in the operative paragraphs of her decision were arguments that had not been raised by the Claimant during the disciplinary process, had not been raised by the Claimant in the ET1 claim form, had not been raised in the witness

statements for the Employment Tribunal hearing, had not been raised during the oral evidence of the witnesses and had not been addressed during the parties' closing submissions. Nor had the Employment Judge, said Mr Nuttman, given the parties the opportunity to address these points before making her decision. Those two points are: firstly, the scope of the disciplinary charge against the Claimant and, secondly, the adequacy of training given to the Claimant.

26. Mr Nuttman submits that paragraphs 31, 36, 39, 44 and 50 of the Written Reasons indicate that the Employment Judge determined whether or not the dismissal was fair on the basis that the charge against the Claimant was solely in relation to how he had investigated the incident in relation to the defective tyre that had been reported to him on 16 October 2018. Mr Nuttman submits that the Employment Judge's references to reasons relied on by the Respondent's managers not having formed part of the allegations against the Claimant, the references to the consequences of "this incident", the reference to the issue being "how the Claimant investigated the incident on 16 October 2019" [sic] which appears in paragraph 44, and the basis upon which no finding of contributory fault had been made, namely that the Claimant had started to investigate the reason the tyre had been defective, all show that the Judge proceeded on the basis that the disciplinary proceedings against the Claimant were limited to that issue.

27. Mr Nuttman makes two submissions in this regard. Firstly, he submits that this question was not raised at all prior to the judgment being given and so the case was decided on an entirely new point. He submits that it was wrong of the Judge not to give the parties, and in particular the Respondent, an opportunity to deal with it. That is because Mr Nuttman's further submission is that the Judge's conclusion on these issues was plainly wrong, to the extent of being perverse. Mr Nuttman submits that the issues raised by the disciplinary process in fact went far wider than the particular incident on 16 October and included the Claimant's alleged failure to take much wider action, (including instituting a check of all buses in the garage) following his discovery on 17

October that two of the four drivers he inspected had not been completing their checks properly. Mr Nuttman submits that the part of the disciplinary charge referring to alleged "inaction allowing vehicles to be driven on the public highway without proper first use checks," certainly when read in conjunction with the concluding paragraph of Mr Clapson's report to which I have already referred, indicates that the charge against the Claimant was far broader than the Employment Judge appears to have found in the operative paragraphs of her reasoning.

28. Mr Nuttman goes on to submit that a number of further conclusions reached by the Employment Judge cannot stand, in the light of this. That includes, he submits, the adverse finding at paragraph 39 regarding the reason why Mr Southgate decided to dismiss the Claimant. Mr Nuttman submits that the Judge's conclusion regarding Mr Southgate having been influenced by his disapproval of the Claimant's stance of defending himself and indicating he would appeal, was materially affected by her view that the disciplinary charge was far more limited in scope than it actually was. The Employment Judge's reference in the concluding sentence of the paragraph to "the fundamental nature of the breach" not being the motivation for Mr Southgate's dismissal is, Mr Nuttman submits, tainted by her earlier error in considering that the breach was in respect of the investigation into the 16 October incident only, and not the wider issues regarding failure to take action more generally in relation to buses in the garage which were, he submits, properly the subject of the decision to dismiss.

29. Mr Nuttman also submits that the Employment Judge's error in relation to the scope of the disciplinary charge was compounded by her reliance at paragraphs 32, 35 and 47 of the Written Reasons on alleged inadequate training by the Respondent in relation to these issues. Mr Nuttman submits that the Claimant did not at any stage raise the allegation that he had not been properly trained in relation to such matters, it again having not been raised during the disciplinary process, in the ET1 claim form, the Claimant's witness statement or at the hearing (whether in evidence or in

argument). Mr Nuttman told me that during the hearing the Claimant was asked a single question by the Employment Judge as to whether he had been properly trained, to which the Claimant's response was that he had been in the industry many years and knew what to do. The point about training was, Mr Nuttman submits, not raised with the Respondent's witnesses and nor did the Employment Judge raise, during argument, the question of inadequate training. Despite that, Mr Nuttman submits, the lack of training was then relied on by the Judge in her reasons, in particular at paragraphs 35 and 47, in support of the conclusion that the dismissal was unfair.

30. During argument this morning, I asked the Claimant whether he accepted that either of these matters, namely the precise scope of the disciplinary charge against him and the allegation of inadequate training on the relevant issues, had in fact been raised in the disciplinary proceedings, or in his claim to the Employment Tribunal, or at the Employment Tribunal hearing. The Claimant confirmed to me that Mr Nuttman's submissions were accurate in respect of what had and had not been raised, and that both these points relied on by Mr Nuttman had indeed arisen for the first time when judgment was given.

31. In my judgment, the Employment Judge's failure to raise either of these issues with the Respondent’s witnesses or in argument during the hearing means that her decision on the fairness of the Claimant's dismissal cannot stand. It is a basic principle of fairness that parties or their representatives should be given the opportunity to be heard on any issue in the case that is likely to be relevant to the decision. In the present case, the Judge's decision about the reasonableness of the decision to dismiss the Claimant was, in my judgment, clearly materially affected by her view of two issues. Firstly, whether the Respondent's managers had dismissed the Claimant for reasons that went beyond the allegations that had been made against him. Secondly, whether the Respondent had imposed certain standards on the Claimant in relation to the matters for which he was criticised, but which had not been properly communicated to him by training, policies or procedures. That much

is clear, in my judgment, from paragraph 47 of the Written Reasons.

32. If it was obviously clear that both the points raised by the Employment Judge were correct ones and that no evidence or argument might conceivably have been raised to contradict them, then the position might have been different. However, I consider that is not the case here. In my judgment, Mr Nuttman is right in his submissions, at least to the extent that the disciplinary allegation against the Claimant is clearly capable of being construed in the way for which he contends. Further, and in any event, it is also clearly arguable that irrespective of any deficiency in the allegation as framed, the Claimant knew what was being alleged against him because of the content of Mr Clapson's report, the nature of the discussions in the disciplinary and appeal hearings, and at least in relation to the appeal hearing, the terms of Mr Southgate's decision to dismiss which was being appealed. Issues in relation to the framing of disciplinary allegations are, at least arguably, ones of substance and not form: see, for example, the case of **Brito-Babapulle**, to which I made reference earlier in this Judgment.

33. Similarly, in relation to training, I accept Mr Nuttman's submission, that it would have been open to the Respondent, had the point been raised in relation to training in the terms in which it appears in the Written Reasons, to call evidence from its managers on the question of training and also to counter the point in argument by reference to the Claimant's qualifications and experience as a manager. Mr Clapson's investigation report referred to the Claimant as the holder of the CPC qualification and the appeal decision letter referred to certain actions having been expected by the appeal panel, "given your experience as a CPC holder and ex-transport manager." These points might have been raised in argument to address the points raised in the Written Reasons that the Claimant was being held to inappropriate standards by the Respondent. As I have said, however, the parties are agreed that the point was not raised. I accept that these are matters which the Respondent could have raised to counter this point had it been raised at the hearing.

34. These two points are, in my judgment, on their own and together, sufficient for the appeal to be allowed. In that event, the parties are agreed that the claim should be remitted for rehearing before a different judge, and that is what I will order.

35. Given that the case will be heard afresh and given that a decision on the question is not necessary to dispose of this appeal, I prefer not to decide Mr Nuttman's subsidiary point of whether the Employment Judge reached conclusions that were perverse, particularly in relation to the meaning of the disciplinary charge against the Claimant and its true scope. That may be an issue that requires to be addressed at the rehearing. I do not seek to bind the parties or the Employment Tribunal on that question for the purposes of that hearing, at which further and different evidence may be given.

36. It is also, in my judgment, not necessary to address all the other arguments raised by Mr Nuttman which criticise other aspects of the reasoning of the Employment Judge. I do, however, see some force in his criticism of paragraph 37 of the Written Reasons, which is on the basis that the Employment Judge decided that the view of Mr Southgate was unreasonable solely because it was his opinion, rather than asking herself whether or not that opinion was reasonable. I also see some force in Mr Nuttman's challenge to paragraph 41 of the Written Reasons, in which the Employment Judge criticised Mr Evans for failing to take account of evidence before him, but based that criticism on Mr Evans's evidence about the terms of a question he had asked the Claimant in the appeal hearing, rather than on the content of the decision letter.

37. Given that the finding of unfair dismissal is to be set aside, it follows that the Employment Judge's findings at paragraphs 49 and 50 of the Written Reasons in relation to the **Polkey** question, and the finding in relation to contributory fault, also fall away and are set aside. So too does the

Employment Judge's decision as to remedy. All issues will therefore need to be considered afresh at the new hearing.

Conclusion

38. For the reasons that I have given, I allow this appeal and remit the claim for rehearing before a different Employment Judge. Although that was the express view of the parties, having regard to the guidance given by this Appeal Tribunal in the case of **Sinclair Roche & Temperley & Ors v Heard & Anor** [2004] IRLR 763, I also consider that it is appropriate to do so given the nature of the error made.

39. In remitting the case to the Employment Tribunal, I express the hope that the issues to be considered at the rehearing of this claim will be clarified by the parties and the Employment Tribunal prior to the evidence being given, at the very latest. I would suggest that the preparation of a list of issues, either before or at the outset of the hearing, would be of assistance in this case.