



EMPLOYMENT TRIBUNALS

Claimant: Mr I Birtles

Respondent: Transport for Wales Limited

HELD AT: Liverpool (by CVP)

On: 27 & 28 August 2024

In Chambers: 10 September 2024

BEFORE: Employment Judge Porter
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr G Dando, solicitor

RESERVED JUDGMENT

The claimant was fairly dismissed. His claim of unfair dismissal is unsuccessful and is hereby dismissed.

REASONS

Issues to be determined

1. At the outset it was confirmed that the only claim was one of unfair dismissal and the issues were as outlined in the respondent's skeleton argument, namely:

- 1.1. What was the reason for the Claimant's dismissal?
- 1.2. Was that dismissal for a permissible reason?
- 1.3. If so, was the Respondent's decision to dismiss the Claimant reasonable in all the circumstances?
- 1.4. If there was an unfair dismissal, should compensation be reduced if a different procedure would not have resulted in a different outcome , applying the principles in **Polkey v AE Dayton Services Limited 1988 ICR 142?**

Submissions

2. Both parties relied upon written submissions which the tribunal has considered with care but does not repeat here.

Evidence

3. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was that the judge, the parties and each of the witnesses attended by CVP. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
4. The claimant gave evidence.
5. The respondent relied upon the evidence of:-
 - 5.1. Mr L Douth, Driver Performance Manager, North;
 - 5.2. Mr A Smith, Driver Team Manager;
 - 5.3. Mr P Brown, Driver Performance Manager.
6. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.
7. The respondent provided a bundle of documents. Attempts had been made to agree the bundle. The claimant did not agree with the accuracy of some of the documents contained in the respondent's bundle, for example minutes of meetings. He therefore did not formally agree the bundle and produced his own supplementary bundle, which contained some additional documents which the respondent did not agree were relevant. The parties had exchanged bundles prior to the hearing. References to page numbers in these Reasons are references to the page numbers in the respondent's bundle with the prefix "R" and the claimant's supplemental bundle with the prefix "SB".

Facts

8. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.
9. The claimant commenced employment with the respondent as a trainee train driver on 15 February 2021.
10. The claimant was provided with a written statement of the terms and conditions of employment (R80) and a job summary (R92). The contract was for a continuing period of employment, progressing from trainee to qualified train driver, terminable by either side upon notice.
11. The claimant was aware that:
 - 11.1. the required Knowledge Skills and Experience includes:
 - 11.1.1. Exceptional level of concentration
 - 11.1.2. ability to remain cool, calm and responsible
 - 11.1.3. ability to competently drive Transport for Wales trains in a safe and punctual manner
 - 11.2. The required Behaviours and values includes “zero harm” which means that no one is exposed to potential harm
12. The claimant’s role, once qualified, was to drive trains solo to a safe and operationally sufficient standard. Train drivers are required by the respondent to provide a strong display of Non-Technical Skills, including attention to detail, memory retention and professionalism.
13. All Trainee Drivers (“TDs”) are provided with vocational training and an element of academic learning. Transport for Wales details these requirements in a document called the Trainee Drivers Training Procedure (TDTP) (R 43-63). It highlights the areas that the trainee must achieve in both Part A & B training. This is facilitated initially by the Operational Training department where a driver will learn the “Rulebook” (GO/RT 8000) which is a series of documents which contain direct instructions for any person working on or near the railway. It is tailored for specific roles. The claimant was tested on his knowledge of the rulebook (Part A) (R49-52) before progressing, in July 2021, to the second phase of training (Part B) which is the practical handling element.
14. The claimant, in accordance with the respondent’s training programme, was allocated a Driving Instructor (“DI”) (sometimes referred to as the Driver Trainer “DT”)) to conduct the additional practical training elements required before he could progress on to driving trains solo. The minimum number of hours required under instruction was set at that time at 265 driving hours.

The claimant provides evidence of one trainee driver passing out after 216 hours (R416-8) but has not explained how this is relevant to the issues.

15. The Driving Instructor becomes a de facto supervisor for the trainee at this stage and the trainee will work the exact same hours and duties as the Driving Instructor (DI). The trainee drives the train under the supervision of the DI. As the practical training progresses the trainee is expected to rely less and less on the instruction of the DI, to the point where they can demonstrate the necessary skills to safely drive the train solo. The Driving Instructor is still responsible for the safe movement of the train throughout the process and if they feel the requirement to intervene on the grounds of safety then this is recognised as a serious training incident.
16. During this practical training at certain points ("checkpoints") the trainee driver is assessed on his progress by a Driver Team Manager ("DTM") .This allows the trainee to know what is required of them for that stage of training and allows the Driver Team Manager to make judgements on what areas the trainee needs to focus on, or if the Driving Instructor is not covering all aspects of the role. The checkpoints are tailored to allow the trainee to progress.
17. During this practical training stage, trainee drivers are expected to demonstrate the standards set out in the respondent's Driver Competency Standards. This is monitored by the relevant instructors and managers via the Competence Management System ("CMS"). The Driving Instructor and Driver Team Manager prepare reports on the trainee's progress and records any incidents which may have arisen during a driving session or rideout. The trainee driver is able to view the CMS and challenge any entry made, if he disagrees with any of the reports.
18. Once the appropriate manual handling training has been complete, and the standards met, the trainee can be progressed to "pass-out" (Part C) which takes place over the course of approximately a week. During this process a final assessment is made of the trainee driver's competence by the Driver Team Manager (DTM).
19. The respondent operates under Train Driving Licences & Certificates Regulations (R40-42). This includes the following:

19.1. 4.4 Recognised trainer

A 'recognised trainer' is a person who can carry out any part of driver training. They must be a licence and certificate holder and have held competence in driving for 3 years.

19.2. 4.8 Driving Instructor

Whilst all driver instructors and minder drivers (or equivalent grade/title) involved in the accumulation of hours for a trainee driver prior to qualification must have a licence, there are no further competence requirements under TDLCR than

those already covered in the Railway Undertaking's Competence Management System.

19.3. 4.6 Recognised examiner

If an examiner does not hold the traction or route competence, then another driver is required to be "present for the examination" (in order to provide the subject matter expertise for the route/ traction being assessed). The examiner can in this instance only make a judgement on areas of competence they themselves hold

20. The training contract is not for a fixed term. The Trainee Drivers Procedure sets out a total of 35 weeks for the 3 phases of training. However, this can be extended. The trainee needs to record the minimum number of trainer driver hours, and to achieve the necessary standards, before progressing to the pass out stage. This can take some trainees longer than the minimum 265 hours.
21. If the standards have not been met, it is customary to meet with the trainee to identify areas where improvement is necessary. If the improvement objectives are not met within the specified timeframes, a decision is taken whether the trainee is suitable to continue in the role.
22. The respondent expects the trainee drivers to be green/competent after around 100-150 hours driving, and by around 265 hours, would expect that they would be able to drive themselves and be ready to proceed to "pass out".
23. The claimant started the practical Part B training attached to the Shrewsbury depot. He then transferred to the Chester depot. This led to a change in Driving Instructors and a change in routes. Each driving instructor has a different style of training and driving the train within the required standards. The claimant had to adjust his driving style to follow that of his instructor. The claimant was also required to learn a number of different routes. This added to the time required for his training. He did not, during the course of his training, make any formal complaint about his driving instructors or the quality of his training. His first complaint relating to the quality of training and/or assessments on the CMS system was at his first appeal against dismissal (see paragraph 54 below).
24. The progress of each trainee driver is monitored by the Driving Instructor and Driver Team Manager. Any concerns about a trainee's progress towards "pass-out" may lead to an intervention by the Driver Team Manager and/or Driver Performance Manager. If the trainee is not at the required standard then an option is to utilise an "Action plan" which is a plan to develop the trainee. An action plan is drafted by a Driver Manager and/or Driver Performance Manager and the trainee driver and it points out which areas require improvement. The respondent acknowledges that the action plan must be fair, achievable and specific in the interests of the trainee. The action plan will have a timescale contained within it.

25. The respondent does not have a formal capability policy in place. It is accepted that the “Trainee-Driver Training procedure” (R 60-62), is the proper process to follow for trainee drivers (TD). That sets out the procedure to follow where there is a failure to meet the required standard, including the developing and agreeing of an Action plan, referred to as a “development plan.” The procedure includes the following:

Monitoring and reviewing the development plan.

The DT (Driver Trainer) and/or DTM (Driver Team Manager) shall monitor the TD’s progress as per the agreed development plan creating additional events on the TD’s CMS cycle as required to evidence progress at each stage. Evidence on the CMS must demonstrate that competency is being achieved.

On completion, the TD and DT and/or DTM (and anyone else concerned) shall evaluate whether the development plan has been satisfactorily accomplished.

If the DT and/or DTM deems that a TD is not able to meet the standards required once the development plan has been completed and believes there is credible evidence to support the decision, then a report will be submitted to the OTM (Operational Training Manager) and/or HoD (Head of Drivers) who shall review all the evidence and decide on the appropriate action to be taken.

Appeals Process.

A TD has the right to appeal should they disagree with an assessment or performance decision. The stages of appeal are as follows (a failure to agree must exist in each level before the next is implemented):

First stage of appeal:

The first stage of the appeals process is to the TD’s DT and/or DTM. The reasons behind the decisions and disagreement will be discussed. If there is a failure to agree, the TD may request the second stage of appeal.

Second stage of appeal:

The second stage of the appeals process is to the OTM and/or DPM (Driver Performance Manager) who will assess the evidence for the decision. If there is a failure to agree, the TD may request the third stage of appeal.

Third stage of appeal:

The third stage of the appeals process is to the Head of L&D and/or HoD. All evidence from the first and second stage will be independently reviewed, and a final decision made.

26. Mr Douth is the Driver Performance Manager North. He is the area manager responsible for drivers and Driver Team Managers at Holyhead, Llandudno Junction and Chester. He has been in this role for 10 years and has worked for the respondent company for 15 years in total. An integral part of his role and in Driver Management generally is assessing trainee drivers and, where safe and appropriate, progressing them to qualified driver status at which point they are deemed safe to drive unaccompanied. This process is known as 'passing out'. Mr Douth is required to verify, and quality assure trainee pass outs undertaken by his Driver Management team.

27. It has been the practice throughout the employment of Mr Douth in this role as Driver Performance Manager that:-

27.1. the monitoring of performance of trainee drivers, and the preparation of any action or development plans to achieve improvement in performance, are dealt with regionally. It is the normal practice that he as Driver Performance Manager would decide on whether an Action plan was necessary, and the appropriate action where the trainee driver fails to achieve the requirements of any Action plan. It was his decision as to whether a trainee driver should continue in their post. Any challenge to his decision to dismiss would be considered by the Head of Drivers;

27.2. The three stage appeal procedure contained in "Trainee-Driver Training procedure" (R 60-62), applies to decisions taken by Driver Instructors/Driver Trainers and/or Driver Team Managers when assessing the driving of the trainee drivers. Those assessments are placed on CMS. The trainee driver can challenge those assessments, firstly, with the author of the assessment, the DT or DTM, secondly with the Driver Performance Manager (DPM), thirdly with the Head of Drivers.

[On this the tribunal accepts the evidence of the respondent's witnesses. The claimant now challenges the authority of Mr Douth to implement an Action/development plan and/ or reach the decision to terminate a trainee driver's contract, asserting that this practice is contrary to the respondent's written "Trainee-Driver Training procedure" (R 60-62). However, this challenge was not pursued by the claimant during the course of his employment, during his appeals against dismissal in March and July 2023, when the claimant had the benefit of trade union representation]

28. In or around May 2022 the claimant transferred to Chester depot for the balance of his practical training. By this time he had completed 260 hours manual handling training on the Shrewsbury depot routes. Some of the Shrewsbury routes were common to the Chester depot routes – Chester – Shrewsbury and Shrewsbury Crewe.

29. By July 2022, it was noted that the claimant's performance was deteriorating when the respondent would have expected him to improve. The entries on the CMS system showed that the claimant had been observed forgetting signal aspects, there were issues with speeding and a lack of situational awareness. This was a repetitive issue with the claimant, speeding, braking points, and correctly identifying which signals applied to him. One specific incident in July 2022 was when the claimant was going too fast into Manchester Piccadilly station. The claimant was approaching at a speed of 20mph instead of 15mph, which meant that the instructor had to intervene.

30. At this time the claimant's driver instructor was Martin Axon. He was qualified to be an instructor. The claimant did not at the time challenge the qualifications or suitability of Martin Axon to be his instructor.

[On this the tribunal accepts the evidence of the respondent, who confirms that clause 4.8 of the Train Driving Licences & Certificates Regulations (R40-42) applies. (see paragraph 19 above). The claimant was mistaken that his driving instructor needed 3 years experience. He did not raise that complaint at the time.]

31. The claimant had access to the CMS system and could challenge entries made on that system. He did not challenge them at the time.

32. As a result of this lack of progress and the specific issue in Manchester Piccadilly station the claimant was invited for a training review on 5 August 2022 with Driver Team Manager Adam Ricketts and Mr Douth. The reason for the review was stated as:

- 32.1. lack of risk understanding at signals
- 32.2. maintaining line speed;
- 32.3. decision process;
- 32.4. cab discipline - remaining focused in high risk areas and self management to ensure full interaction with controls/ instruments

33. At the meeting Mr Douth reached the honest opinion that the claimant had been displaying a lack of concentration and was not making the correct decisions. The areas of improvement were identified and discussed with the claimant, and he was given a training review outcome with specific areas for improvement and objectives (R191). The objectives were clear and included:

- 33.1. Signals: we will not tolerate lack of positive actions the cautionary/ red signals/ DRA - to be no more DI interventions
- 33.2. Focus /concentration - To be no more lapses in focus/ concentration, no more DI intervention
- 33.3. Speed maintenance - ensure PSR's already here too TSR's are identified and acted upon. No more DI intervention

- 33.4. Stations /routes- we want an immediate increase in your route knowledge application - There are to be no more interventions by a DI for braking area, route risks to be highlighted to the DI in cab or questions asked where risks/ areas are not identified
- 33.5. in Cab environment - Positive engagement with DI, raise questions/ risks identified for areas. 2 way dialogue to be created when safe to do so relating to information pertinent for safe train operation. This is not to distract from safe train running.
34. An action plan was created (R 191) whereby the claimant was given a 3-week period to improve.
35. The claimant did not challenge the review or the implementation of the Action plan.
36. In October 2022 there were email exchanges between two managers, as evidenced by redacted emails provided to the claimant following a subject access request (SB46) . The email included the following comment:
- “ one of my main concerns is Ian Birtles who we have an action plan - it is quite possible that he will not make pass out.”
37. The claimant was unaware of this e-mail at the time of his employment. It is not clear who were the managers involved in this e-mail.
38. The claimant was unable to initially undertake the full 3-week period before going off sick for a period of around 6 weeks.
39. Upon the claimant's return to work there was no procedure followed. There were no discussions and no return to work meeting arranged. The claimant had been referred in his absence to the respondent's occupational health advisor, Medigold. On his return the claimant did not request any adjustments to be made to his duties in light of his treatment for high blood pressure.
40. On his return from ill-health absence the claimant was provided with a new Driving Instructor, Kurt Haddock, who had more experience as a DI. Mr Douch believed that the claimant would benefit from Mr Haddock's experience.
41. The claimant was not advised that the Action plan had not been achieved or was to be extended. He was not told that he had completed the action plan successfully.
42. On 24 August 2022 the claimant's driver instructor reported on CMS that he had to intervene to prevent a “stop out of course incident” at Burnage. His report included the following:
- I think this was due to a combination of factors - your first drive over this route since your leave; fatigue, as we'd booked on at 03:18 that morning, and a loss of

awareness as we had been proceeding at caution due to consecutive yellow signals.

You did fully own your mistake and you were keen to learn how to stop it happening again. A handy tip is, if you're unsure about the station, to check the station name before committing to a full stop.

Please remember that I am still in the cab with you if you want to double check anything, or ask if you're not sure about something. Starting work so early in the morning is difficult - fatigue sets in sooner and it's harder to remain fully alert,

However it is imperative in our job to manage concentration levels as the same high standards are required throughout the shift.

43. The claimant acknowledges that this was a breach of the Action plan and that he could have been dismissed as a driver at this point. No action was taken at that stage by Mr Douth to terminate the claimant's employment as a trainee driver.
44. The claimant's driving was assessed on 3 February 2023 by Richard Lee, DTM in respect of his suitability to proceed to pass out. The Assessment Outcome (R221-222) was placed on the CMS. It reported a number of errors by the claimant and, in particular, noted that DI Kurt Haddock had to intervene and tell the claimant to put the brake on as the Claimant failed to react to a red signal and was going to have a SPAD (signal passed at danger). Additionally, the claimant had failed to answer a question correctly about a warning light that they had just passed. The report concluded :
- " I informed trainee Birtles on arrival at Earlestown station that I would be taking over control of the train, I asked trainee Birtles to go and sit in the train for the remainder of the journey due to the seriousness of what had occurred.
- Personal attributes**
Poor decision-making progress
Lack of focus and situational awareness at critical times
Failure to act on warnings given (signals)
poor recall (signals)
- Feedback to candidate**
The purpose of today was to assess your readiness for a possible pass out week. Unfortunately, you have demonstrated a poor decision-making process and a lack of situational awareness of critical times, which could have resulted in a SPAD today.
As a result I do not deem you at a satisfactory standard to go forward to pass out
45. On 6 February 2023 the claimant was invited to a capability review hearing (R223-224). The letter explained that the hearing was to review the progress he had made since August 2022 and consider his capability for the role. The claimant was warned he could be dismissed. He was advised of his right of representation.

46. The hearing took place on 9 February 2023 (p226-235). Mr Douth chaired the meeting and was assisted by Adam Ricket and Richard Lee (both DTM) who had assessed the claimant since August 2022, and had the 'hands-on' experience of supervising the claimant driving the train. The claimant was accompanied by John Hughes, Union representative. Neither the claimant nor his trade union representative challenged Mr Douth's ability to chair the hearing and make any decision. It was not argued that the action plan and the consideration of termination of the contract should be dealt with by the Head of Drivers. It was not argued that Mr Douth's involvement at this stage was a breach of "Trainee-Driver Training procedure"
47. At the hearing Mr Douth talked through with the claimant the issues that had been observed since August 2022. Reference was made to the reports on the CMS system. The claimant was given full opportunity to challenge the reports and to put his case. Both Mr Rickett and Mr Lee were able to provide information and answer questions. Mr Douth addressed in particular the following incidents:
- 47.1. on 24 August 2022 where there was a mistake, attributable to a lack of concentration;
 - 47.2. On 31 August 2022 there was an issue with a wrong signal when questioned (p231);
 - 47.3. On 26 November, although not a strict advisory, there was the general comment that the Claimant gets distracted/loses focus (p231-232).
 - 47.4. The final assessment by Richard Lee, which the claimant had failed. When asked about this the claimant said that his nerves had gotten the best of him .
48. The issue of the claimant's blood pressure was discussed briefly, and the claimant stated that it was under control. He did not put that forward as an explanation for his driving performance.
49. Having reviewed the assessments Mr Douth noted that going into the assessment in February 2023 there was a pattern of issues of concentration and focus. These were not issues Mr Douth would expect for a trainee driver with as many hours as the claimant, who had had approximately 400 driving hours by this stage.
50. Having considered the claimant's responses, Mr Douth explained to the claimant that he had concerns that signalling, and concentration seemed to be a consistent problem with him. Mr Douth noted that although the claimant's nerves, would play a factor, the respondent needed to be confident that the drivers can undertake their role safely and confidently in a high-pressure environment.
51. Mr Douth informed the claimant of his view that the claimant could not demonstrate that he could drive a train independently and safely. Taking

into account the past issues, and his most recent assessment when there had been instructor intervention, Mr Douth concluded that the claimant had not met the objectives which have been set out and he had been given ample time and support to meet those objectives. There was also a pattern of issues with his driving and essentially the lack of progress measured against the time he had in the chair, meant it was unlikely that he could be capable of doing the role. Therefore, Mr Douth had made the decision to dismiss the claimant from his position as trainee driver.

52. Mr Douth wrote to the claimant on 14 February 2023 explaining the reasons (R251-252). Extracts read as follows:

We discussed issues relating to your performance in the trainee driver role. We reviewed a number of documented issues regarding your performance since early 2022 and most recently during an assessment on Friday 3rd February. At this meeting it was decided that you would be given a period of four weeks' notice where we would assist you in finding alternative employment within TfW. At the end of this period, if you are unsuccessful in securing an alternative role, your employment will be terminated on the grounds of capability.

The reason for the termination of your employment was your performance in the role, specifically that you failed to meet the required standards of your role despite being given 400+ hours of training.

After your performance appraisal on August 4th 2022, subsequent feedback from two Driver Instructors and a Driver Team Manager was that you were continuing to struggle with situational awareness and, although you had made some improvements, they were still not enough to progress you to pass out week. We took the view that you were underperforming to the extent that we could no longer safely continue with your training.

We did take steps to help you to improve your performance, including allowing over 400 hours training. The usual expectation for passing a driver as qualified is 265 hours. We also took time to set clear and achievable objectives at our review in August, specifically:

- Signals – We will not tolerate lack of positive actions for cautionary/red signals/DRA – to be no more DI interventions.
- Focus/concentration – To be no more lapses in focus/concentration, no more DI Intervention

We took into account your personal health issues and ensured that you were given the time and adjustments to allow you to complete the training. We also changed your Driver Instructor in the hope that a different coaching style would make a difference. Unfortunately, we did not see sufficient improvement in your performance following these steps.

53. The claimant was advised of his right of appeal.

54. The claimant exercised that right by email received by the respondent on 16 February 2023. The respondent noted the grounds of appeal as:

- I never received sufficient hours over my core routes.
- Inadequate/Inconsistent Training
- My DTM did not communicate sufficiently especially around my development, and he shared preconceived ideas with other DTM, s and instructors.
- Inadequate and biased Investigation, which didn't give a full or true reflection of my development.
- I did not receive adequate chain of care after returning to work after a serious illness.
- My training and development was seriously hampered by my undiagnosed and uncontrolled high blood pressure, which lead to a hypertension crisis at beginning of September, which in turn affected my concentration and focus in the lead up to the event in September. Which has now been rectified with medication, lifestyle changes and constant monitoring.

55. An appeal hearing was held and was conducted by Mr David Taylor, Head of Drivers. The claimant was advised of his right of representation and exercised that right. Following that appeal hearing the claimant was advised of the outcome by letter dated which stated as follows:

I am writing to inform you of the outcome of the appeal hearing held on 17th March 2023.

On consideration of your grounds of appeal and matters raised by you and your representative at the appeal hearing, we have decided to uphold your appeal. The new decision is to re-instate you to your previous position of trainee driver. The return is conditional on the points outlined in your return to work action plan (attached).

56. The action plan was agreed at a meeting with Mr Douth, the claimant and his trade union representative. It was attached to the appeal outcome letter and signed by Mr Douth and the claimant (R260). Extracts read as follows:

Return to Trainee Driver Duties Action Plan

Trainee Driver Ian Birtles was restricted from trainee driving duties following an assessment on 3rd February due to an intervention against a RED signal (WN547).

This was following a review in August 2022 where concerns were raised and minuted regarding Ian's progress in the trainee role, specifically around situational awareness and maintaining focus at critical times.

Following a review on 9th February, Ian was served notice by DPM Luke Douth. At the subsequent appeal it was recommended that Ian be given one final chance in the trainee driver grade. The Return to Work Action Plan is outlined below.

Ian's return to trainee driving duties is on the proviso that all the actions in this Return to Work Action Plan are met to a satisfactory standard and that he is able to successfully complete pass out week following the conclusion of his manual handling hours extension.

Reason for Action Plan:

Immediate causes

- Trainee driver failed to react to cautionary aspects on approach to WN547 signal which was at danger.
- In addition to the above, there have been 10 documented instances where Ian has displayed a lack of situational awareness, some of these at critical moments (see Appendix A)

Underlying cause

- Trainee driver has lost focus and attention, resulting in the incidents listed in Appendix A and resulting in the performance review (Appendix B). 7 of these instances took place in the lead up to Ian's absence with hypertension, which it is suggested may have been a contributing factor.

Purpose of Action Plan:

To set out clear next steps and also outline what is expected of Ian. The trainee driver shall be undertaking a set additional amount of manual handling hours where he needs to adopt driving/concentration techniques that allow him to maintain focus and situational awareness at all times while driving. He also needs to manage the (now diagnosed) hypertension so that it does not impact on his learning.

Next Steps:

- 1.28th - 30th March: Complete 3 days cl.197 classroom/static at Chester Training Centre (City Place). This is to enable meaningful accumulation of driving hours with his Driver Instructor as 197's are increasingly in use on core routes.
2. 31st March: Agree the RTW plan
3. W/C 2nd April begin an 80hour extension of the manual handling phase with a Driver Instructor
4. Undertake an occupational health review at 11.15 on Wednesday April 12th to confirm Ian is continuing to effectively manage his hypertension while undergoing his manual handling/pass out

5. Midway DTM checkpoint at approximately 40hrs in order to assess progress
 6. Final DTM checkpoint at 80hrs to assess whether can be put through to pass out
 7. Conclude the manual handling extension at 80 hours, no further extension of hours beyond this unless it is to wait for DTM availability in order to pass out.
 8. Any Driver Instructor or DTM intervention during this 80 hour handling extension, or during pass out, specifically an intervention to prevent a safety related incident (e.g. SPAD, TPWS activation, speeding event), would mean Ian is unable to continue as a trainee driver
57. No satisfactory evidence has been provided by either party as to the reason for Mr Taylor's decision to uphold the appeal. The only evidence before the tribunal is the outcome letter and action plan. There is no satisfactory evidence to support the claimant's assertion that a decision of the appeal officer was that previous hours of driving should be ignored in the future assessment of the claimant's ability capability. Neither the appeal officer nor the claimant's trade union representative have been called to give evidence.
58. Following the reinstatement of the claimant he continued to work under Mr Douch's team's management. He was given a new Driver Team Manager, Anthony Smith, who has worked for Transport for Wales for 5 years in various roles and as a Driver Team Manager for 18mths. In a previous role with Transport for Wales Mr Smith gained experience in setting out training plans to assist drivers and management with regards to capability issues. This was as an Operational Trainer.
59. The claimant was also given a new driver instructor, Mr Paul Williams, a very experienced trainer. Mr Williams was released from his normal duties as a driver, which would have required him to travel outside the normal routes, for example, drive to Birmingham. He was also released from working anti-social hours. In this way the claimant, who completed his practical training by driving a train under the supervision of Mr Williams, could stay and practice on the routes on which he would be assessed.
60. The claimant made no complaint at the time about these changes or the quality of the instruction.
61. Every ride out is graded, not only assessments. The report of each ride-out and/or assessment is prepared by the Driving Instructor or Driver Team Manager and placed on the CMS. The employee can challenge the reports if they are inaccurate.
62. A trainee can be graded exceptional with no advisories at all, competent (green), advisory (orange) need to speak about minor things. Review (red)

is a failed assessment, because the instructor or the manager has had to intervene to stop a safety issue.

63. Mr Williams prepared a report of his assessment of the claimant's driving for the week ending 29 April 2023 (R263 – 264). This was graded as advisory. It included the following Feedback:

Bit of a mix this week Ian, you coped well with some unfamiliar moves and methods of working and asked questions to ensure a clear understanding of them. You coped well with request stop working liaising in the proper manner and reaching a clear understanding with the Conductor.

However at times this week I felt that your Focus/Concentration was drifting a little this was most evident whilst driving back from MIA Monday 24/04/23 when you initially targeted incorrect signals upon two occasions. You powered off both times and allowed the unit to coast crucially not taking power towards signals at Danger and braking when realisation dawned. A little later that day you missed/failed to re-act to a Whistle board at Gaerwen shortly after telling me that you had missed one in the area upon two occasions previously, I had to tell you 3 times before you reacted and sounded the horn.

It is vital that you take a little more care Ian, ongoing I will be urging you strongly to carry out a full/comprehensive commentary whilst driving at all times which should help you to keep focussed on the job in hand.

64. This was a driver intervention and a breach of point 8 of the Action plan. Mr Williams did not assess this as a fail. No steps were taken by the respondent to end the claimant's training at that point. The training and assessments continued.

65. Mr Williams placed on CMS his assessment of the claimant's driving for week ending 6 May 2023 (R268-269). Again, this was graded as advisory. It includes the following feedback to the driver:

Ian, you coped well upon receiving the Emergency call at Prestatyn reacting in the appropriate manner and liaising with the various Signallers involved, your MID point Action plan Assessment went reasonably well.

However at times you are struggling to maintain your focus and concentration levels, failing to change end lights whilst shunting, confusing relevant signal/head code whilst setting up cab plat 7, allowing speed to creep up a little at Whittington crossing, forgetting about 40mph warning board Llanfair PG, forgetting about shunt/turn back Earlestown and unable to put ERTMS into Shunt mode.

66. Mr Williams placed on CMS his assessment of the claimant's driving for week ending 13 May 2023 (R270-271). Again, this was graded as advisory. It includes the following feedback to the driver:

Ian you have coped well whilst driving differing unit types 150 coupled to 158 remembering to use initial step 2 braking at all times and 75mph max speed.

You reacted well when receiving 2 bell/buzzer code for request stop working.

Unfortunately you appear to have struggled again at times with focus and concentration as evident when confusing line speeds and forgetting train was 4 car upon approach to Abergele and Pensarn.

You stated that you would power off and brake at same time upon approach to Runcorn East instead off powering off before braking and appeared confused when TMS alarm sounded 175 unit looking at it but not acting upon it until prompted.

Whilst chatting about various subjects to fulfil Train driving competence standards you were unable to answer clearly/properly at times and upon occasion answering a question with a question.

Ian I will continue chatting /questioning you about subjects to fulfil Competence standards, this should help with your confidence whilst answering.

67. The claimant had his 40 hour check-in as agreed (R226-227), and had his 80 additional hour final assessment on 18 May 2023. Mr Smith conducted both assessments, with Mr Williams driving in the cab. Mr Smith was qualified to make the assessments. Although Mr Smith did not hold the necessary competence requirement for part of the route – Manchester Piccadilly to Manchester airport, Mr Williams was in the cab at all times and he had the necessary competence for that part of the route. Mr Smith assessed the claimant on his driving competency and did not raise questions with the claimant about this part of the track.

[On this the tribunal accepts the evidence of the respondent.]

68. The claimant's 40-hour assessment (R 266-267), was an advisory, not a fail. The report was placed on CMS. It included the following Feedback:

Overall this was a successful ride out for your 40 hour period.

It was good to see that you followed the PDP with regards to positive actions relating to cautionary aspects.

There are small areas of route knowledge that need to be enhanced, such as areas that you could be asked to turn around in times of disruption.

The issues that have arisen in the past related to situational awareness and loss of focus at critical times. It is vital that you as a driver maintain these skills throughout, as the moment they lapse is where the errors and incidents occur. It was good to see that none of these lapses occurred during this ride out but vigilance in your own understanding of these risks is paramount moving forward. When the time comes for you to be assessed solo there will be no safety blanket in the form of an instructor. I want you to focus on this in the next 40 hours to rely less on Paul's instruction and start to take ownership more of your driving.

Well done

69. Mr Williams placed on CMS his assessment of the claimant's driving for week ending 17 May 2023 (R273-274). Again, this was graded as advisory. It includes the following Personal Attribute comments and feedback to the driver:

Personal Attribute Comments

Ian was able to carry out above solebar preparation duties 150 unit.

Ian coped well driving over WRX- Bidston route having not driven over it for a while. Ian was unaware of Axle counters Heswall area or local instructions regarding this (not to set back).

Above solebar preparation duties carried out on 197 unit, Ian appeared a little lost at times and required prompting however he does not have much practical experience of 197 preparation to date.

Ian became confused regarding his braking area for WN217 signal Acton Grange/WBQ area, we have driven over the route many times and have had to brake for this particular signal on previous occasions. Ian could not recall/unaware of line speed platform 4 WBQ stating 30mph instead of 50mph in and 30mph out. Ian seemed a little dazed upon arrival at MIA and although prompted that line speed into platform was 15mph maintained unit speed at 7mph for the length of the platform.

Whilst braking for Shotton Ian used initial braking into step1 and had to be reminded to use step 2 initial braking for 158 units.

Ian remembered to check HD25 signal upon departure from HHD. When upon approach to and questioned about particular features BR60 signal Ian could not recall that it is 4 aspect although we have discussed this upon every trip we had been on from HHD.

Feedback to Candidate

Ian you have coped well request stop working to/from HHD and were able to gain valuable experience carrying out above solebar preparation duties.

It was your first time in a while driving over the WRX-Bidston route and carrying out relevant shunt moves.

Unfortunately there has again been evidence of focus/concentration issues this week and I could see that you struggled with the early shift starts at times.

Upon changing ends at WRX you had to return to rear cab to retrieve your Drivers key.

You stated an incorrect area for braking for WN217 signal at Acton Grange/WBQ and could not recall the correct line speed for platform 4 WBQ.

You were using initial braking in step1 for 158 traction until reminded to use step 2 braking in the first instance.

When questioned about BR60 signal you were unable to recall that it is 4 aspect even though we have discussed this multiple times.

You must take steps to improve your levels of focus/concentration. At times you have also struggled with your route knowledge this week in particular line speed WBQ and features of BR60 signal I suggest you spend some additional time studying your route notes/maps.

70. The claimant did not at the time challenge the accuracy of any of these reports on CMS on his driving performance.

71. Mr Smith undertook the 80 hour assessment on 18 May 2023 and placed his report on CMS on 1 June 2023. (p275-276). Extracts read as follows:

I observed his speed increasing over the PSR of 75 mph and it reached 81mph Ian only applied his brake when he observed DI Williams, who was also in the cab point at the speedo in front of me on the second person side..... At the same time there was clearly 2 trackworkers on the opposite side of the track. Ian did not see them until he was approx 200 m away from them.

I observed Ian suffer from cognitive overload and I refrained from speaking until he got the situation back under control. The situation was not a stressful one as the signal was clear and it was plain line with no obvious risks.

Ian then preceded towards Helsby and when asked how many signals were at Helsby stated 6 and then changed his mind to the correct answer of five as we got closer to the area

.....

Feedback to candidate

I understand that you want to do well in your role and have been putting in effort in your attempts to become a safer and more effective driver.

I cannot however deem this ride as competent as the lack of situational awareness relating to the overspeed and the failure to recognise the track workers outweighs a lot of the positive elements of the assessment.

As I said to you in the feedback given immediately after your ride I do believe that if everything is running normally then you could successfully get from A to B.

However, when you are placed under any sort of non standard situation the lapses of concentration that have been highlighted in the past re-appear. I do not believe that you could successfully drive this route if you were asked to turn back early at many of locations highlighted and this in turn could result in you losing focus at a critical stage .

72. Speed is an extremely important issue. The profile of the track is rated for a certain speed and if a train goes over a set of points too quickly, there is a chance of derailment. This could result in serious injury and could lead to fatalities.

73. As Mr Smith and the claimant came off the train, Mr Smith told the claimant that he was not judged as competent, but that Mr Smith did not and could not give any indication as to what would happen next. Mr Smith told the

claimant that his view was that the claimant was not competent, as he would panic and show a lack of focus and situational awareness. Mr Smith reported the failed assessment to Mr Douth.

74. Following this the claimant stayed at home on full pay until a meeting could be organised. He carried out no more duties. He did not proceed to assessment under the pass-out procedure.
75. Mr Douth wrote to the claimant on 26 June 2023 inviting him to a meeting on 30 June (R294-295). The letter states

Notice of capability review hearing

...

A training review was held on Thursday 9th February with myself and DTMs Adam Rickett and Richard Lee following concerns raised by your DI's and DTM up to that point regarding your progress in the trainee role. While you were served 4 weeks notice at the review, at a subsequent appeal you were given another opportunity to prepare for pass out on a Return To Work plan which involved a new DI, a new DTM and 80 more manual handling hours. You have now reached the 80 hours and had your final checkpoint.

I would now like to meet with you for a capability review The hearing will be chaired by myself, Anthony Smith (Driver Team Manager) with Richard Dunscombe (Human Resources Business Partner) dialling in to provide support to all parties and to take notes of the hearing.

At the hearing I will be considering your capability in the role of Trainee Train driver.

During the hearing you will be given a full opportunity to respond to the issues relating to your performance. You may also put forward any mitigating factors which you consider relevant to your case.

76. The letter confirmed that the claimant could be accompanied and that a potential outcome could be dismissal.
77. The claimant was not provided with any specific allegations of incompetence or performance, and was not provided with any documents prior to the hearing.
78. Approximately 2 weeks before the capability review hearing Mr Douth had an informal meeting with the claimant and his trade union representative when it was explained that Mr Douth would be referring to all the documents on the CMS system at the forthcoming hearing.

[On this the tribunal accepts the evidence of Mr Douth]

79. Prior to the capability review hearing the claimant did not request copies of any specific documents, did not request a copy of the 40 hour or 80 hour assessment.

80. The claimant was represented at the hearing on 30 June 2023 by his trade union representative. The claimant did not at the commencement of the hearing ask for details of the specific allegations of incompetence, did not ask for any documents. During the course of the hearing Mr Douch considered the assessments and ride out reports on the CMS system which had been assessed as failed or advisory. The claimant did not ask for further time to consider these matters before responding to questions.
81. The claimant did at the outset of the hearing question the suitability of Mr Douch to chair the hearing, based on the fact that Mr Douch had previously made a decision to dismiss, based on his earlier assessment that the claimant had failed to demonstrate the necessary competencies to become a driver. The claimant was told that as this was a capability hearing Mr Douch was the correct manager to consider the issues and to chair the hearing.
82. The claimant did not challenge the ability of Mr Douch to conduct the hearing because he lacked the appropriate status as required under the "Trainee-Driver Training procedure" (R 60-62), It was not asserted that only the Head of Drivers could reach a decision as to whether the claimant should be dismissed.
83. Notes were taken of the hearing. The claimant did not agree the notes as accurate. This issue was not resolved. There are no agreed minutes. The respondent's minutes appear at R308-332. At that hearing:
- 83.1. Mr Douch reviewed the assessments which had been made of the claimant's driving in the period since the Action plan had been agreed following the claimant's reinstatement in March 2023. The claimant was given the opportunity to provide his comments, explanations and any objections to the written entries on the CMS system. The claimant had access to the CMS reports during the hearing;
- 83.2. Mr Douch discussed with the claimant the assessment of his driving instructor on the weekend of 29 April, when he had written:
- 'At times this week, I've felt your focus and concentration was drifting a little, this was most evident when driving back from Manchester Airport when you initially targeted incorrect signals upon two occasions. ...A little later that day, that you missed/failed to react to a whistle board. Shortly after telling me that you had missed one in the area two occasions previously, I had to tell you three times before you reacted and sounded the horn.
- The claimant accepted that he had targeted incorrect signals, that he had missed a whistle board, and that his driving instructor had to tell him twice before he reacted and sounded his horn.
- 83.3. Mr Douch discussed with the claimant the 80 hr assessment conducted by Mr Smith, who was in attendance at the meeting and

provided further information. The claimant accepted that he had been speeding during that assessment. There was a discussion about how much, and for what period of time, the claimant had travelled over the speed limit of 75mph. Mr Smith showed the claimant a screen shot of the speed taken at the time. It showed that the claimant had been travelling between 80-81 mph.

[On this the tribunal accepts the evidence of the respondent's witnesses.]

- 83.4. Mr Smith confirmed that the claimant was late seeing the 2 trackworkers on the track but did sound his horn when he saw them;
- 83.5. The claimant accepted that he had completed 480 hours of driving. He argued that 80 hours should be discounted
- 83.6. Mr Douth said that the claimant had completed 220 hours more driving than any other trainee.
- 83.7. The claimant asserted that some of the questions asked in the 80 hour assessment were questions which had not been asked of other trainees and that he had never been trained on the subject matter of those questions: questions on "turn outs". Mr Douth said that he frequently asked these questions of trainees when he gave the trainees their licence and that they frequently gave the correct answer;
- 83.8. The claimant did not assert that his ability to drive was adversely affected by any health problems or any temporary issues which could be resolved in the near future.
- 83.9. The claimant challenged the accuracy of some of the entries on the CMS system, saying that some details had been missed.
84. Whistleboards mark foot crossings on the track. Drivers are expected to know where whistleboards appear on their route so that they can sound their horn as they approach to alert any pedestrians. The drivers are expected to do this even if the whistleboard is covered by vegetation or has blown over.
85. On 3 July 2023 Mr. Smith placed on CMS an Assessment headed "Closure of cycle" which included the following:
- Ian was placed on an action plan due to capability issues...
Unfortunately Ian was not able to fulfil the requirements of the action plan and was dismissed from the role as a driver....
This cycle will be closed as a result
86. Mr. Smith did not take part in the decision to dismiss. At the time of writing this entry on CMS he was unaware of the decision of Mr Douth. He made an assumption that the claimant would be dismissed. He accepts that he

should not have completed this entry with these words. He says he should have used the words “will not carry on as a driver.”

[On this the tribunal accepts the evidence of Mr. Smith]

87. After the hearing Mr Douth considered the claimant’s performance since the creation of the action plan in March 2023, as reported by his managers and the claimant’s responses. Based on the recommendations of Anthony Smith, and what the CMS captured, Mr Douth concluded that the evidence was that the claimant was not competent. Also, the claimant had failed to satisfy the goals of the Action plan. Mr Douth reached the belief that the claimant could not demonstrate that he could drive a train independently and safely. In reaching his decision:

87.1. He took into account the fact that the claimant had 480 hours of driving, more than the average trainee. He was unaware that it had been ordered at the appeal before Mr Taylor that 80 hours of driving should be discounted because of the claimant’s ill-health. He had not been informed of that. It was not recorded in writing. He accepts that he was wrong when he said at the capability review hearing that the claimant had 220 hours more driving than any other trainee and that he should have said 220 more hours than the average trainee. Mr Douth based his decision on this assessment, rather than what was said at the capability review hearing;

87.2. Mr Douth accepted the accuracy of the reports on the CMS system.

87.3. Mr Douth decided that the claimant had not met the objectives which had been set out in the Action plan and that he had been given ample time and support to meet those objectives.

87.4. Mr Douth believed that there was a pattern of issues with the claimant’s driving, in particular loss of focus and concentration at critical times. This was demonstrated with the claimant’s speeding and the failure to sound his horn at required times;

87.5. Mr Douth had particular concern about the claimant failing to sound his horn at a whistle board when driving with Mr Williams (see paragraph 63 above). He noted that the claimant had stated to Mr Williams that he had missed a whistleboard before. Whereas Mr Douth thought that the fact that the claimant had missed a whistleboard earlier in his training could be overlooked, he decided that the incident with Mr Williams was very serious as he had missed the board and had to be told repeatedly before he sounded the horn.

Mr Douth concluded that the claimant could not demonstrate the standards required of a driver and made the decision to dismiss the claimant from the role as trainee train driver but to give him the opportunity to find alternative employment within the respondent company.

88. By letter dated 7 July 2023 (R306) the claimant was advised of the decision. Extracts read as follows:

Following on from your appeal in March it was decided that you would be given a period of 80 additional hours to improve your performance in the Trainee Driver role using an 8-point Return To Work plan.

Unfortunately, you have not achieved the required standards outlined in your plan which is why we will be placing you in a period of redeployment for 4 weeks where we would assist you in finding alternative employment. At the end of this period, if you are unsuccessful in securing an alternative role, I must caution that you may be dismissed on the grounds of capability.

At your performance review on Friday 30th June 2023 we reviewed feedback from your Driver Instructor Paul Williams and Driver Team Manager Anthony Smith. The feedback was that, although you had handled elements of the manual handling well, you were still not at a standard where the DI or DTM would be satisfied to progress you to pass out. We have taken the view that you are underperforming to the extent that we can no longer continue with your training.

We did take steps to help you to improve your performance, including allowing 400 hours training and changing both your DI and DTM. We also released your DI during the Return To Work plan so that you were able to focus on core routes at predominantly sociable hours. The usual expectation for passing a driver as qualified is 265 hours. We took into account the points raised by you at our meeting but, unfortunately, we have not seen sufficient improvement in your performance following the steps that we took to allow you to improve.

We will be in regular contact to review your progress in any application, and should you require any further support in this manner, please do not hesitate to contact us.

You have the right to appeal against this caution. If you wish to do so, you must do so in writing to Richard Dunscombe HR Case Manager within 7 days of receipt of this letter setting out in full the grounds on which you are appealing.

89. The claimant had not driven since the final assessment on 18 May 2023. He remained at home suspended on full pay until the capability hearing on 30 June 2023 and the announcement of Mr Douth's decision that the claimant could not continue in his training as a train driver and was placed in a period of redeployment for 4 weeks. The claimant remained in the paid employment of the respondent while he applied for alternative positions. He was supported by the respondent in this. He asked to meet Mr Douth to discuss his search for alternative employment. Mr Douth had genuine concerns that he should not meet with the claimant if there were any allegations against him personally in the claimant's grounds of appeal against his dismissal. Mr Douth therefore asked to see the grounds of appeal before meeting with the claimant. Mr Douth was supportive in the

claimant's search for alternative employment. On 25th July 2023 he sent an e-mail (SB69) to HR stating:

“ We have a trainee Ian Birtles who was recently served notice due to not successfully completing the trainee course. His issues were very specific to the grade and not a reflection of his personal professionalism or attitude. In line with our processes, we have given Ian a redeployment period of four weeks during which he is guaranteed an interview for any role he has the requisite skills for. I understand he has applied for the duty station manager role at Chester. Is it possible he could be advanced to interview stage?”

Mr Douth and the claimant met on 6 September 2023 to discuss steps to assist in finding alternative employment.

90. The redeployment period was initially for 4 weeks. The respondent guaranteed the claimant interviews for whatever role he applied for, in accordance with the company's normal policy. By the end of August, the claimant had been in redeployment, on full pay, for longer than 4 weeks. As he had not found further work, Mr Douth wrote to the claimant by email dated 24 August 2023 to give the notice of dismissal (R 335). The email states:

Following on from our meeting on the 30th June, you were placed on a period of redeployment where we committed to assisting you in finding alternative employment by way of a guaranteed interview for any position you applied for via our comeaboard website.

This period has now ended. We will still guarantee any interviews that you may have already secured but at the time of writing you have not been successful in finding alternative employment within TfW.

As stated at our meeting we are now serving you notice on the grounds of capability. This will be 4 weeks in total meaning your employment will end on Wednesday 20th September

91. Mr Douth did not have another meeting, following the end of the redeployment period, because in his view he had been very clear in the meeting of 30 June 2023 that the claimant would be dismissed if he did not find alternative employment during the redeployment period. This was against the advice of HR, who had indicated to Mr Douth that he should have a meeting at the end of the redeployment period to discuss the outcome. (SB 47). It was the claimant's understanding that there would be a further meeting and he was disappointed that no further meeting was held. The claimant did understand that he would be dismissed at the end of the redeployment period if he had failed to find alternative work with the respondent.
92. The claimant appealed the decision to end his training as communicated to him by letter dated 7 July 2023. The appeal was heard by Mr Phil Brown. He has worked for the respondent for some 20 years, firstly as a train driver for 11 years before moving on to various operational manager positions for the past 9 years. He currently holds the position of Driver Performance Manager. However, at the time of the appeal he was seconded to position

of Head of Drivers for the core Valley lines. He was therefore qualified to act as Appeal Officer.

93. Mr Brown had experience of managing a team of drivers. This includes the management of operational competency, ensuring full compliance with industry standards, ensuring any deficiencies are identified and corrective action plans formulated. He also has experience of handling grievance and disciplinary hearings. He did not have experience of handling appeal hearings.
94. The appeal hearing was heard on 1 September 2023. The claimant attended with his trade union representative. The notes of that meeting prepared by the respondent appear at R346-401. The tribunal accepts the accuracy of those notes. The claimant has not in evidence raised any satisfactory challenge to them.
95. Prior to the appeal hearing Mr Brown was given the same pack which the previous appeal manager, David Taylor had been given. Additionally, he was given the Action Plan (R259-261) and Driving Instructor (DI) and Driver Trainer Manager (DTM) feedback that had been provided to the claimant since his reinstatement (R263-271 & 273-276), as well as the letter (R306-307) and email confirming dismissal.
96. The claimant raised a total of 10 points in the appeal. These were discussed at the appeal hearing. The claimant was given full opportunity to state his case. At that appeal hearing:
 - 96.1. The claimant made a complaint about the length of time it had taken to hear his appeal. Mr Brown acknowledged that the hearing could have been held sooner but noted the delay was in part caused by unavailability on both sides.
 - 96.2. The claimant alleged that he had been told by another employee, Chris Howard, before his first capability hearing in February 2023, that no DTM at Chester would take him through to pass out;
 - 96.3. The claimant alleged that he was tasked with more difficult routes and had been asked questions that were unfairly difficult, he had been treated differently to other trainees, who had not been asked questions which they could not answer. The claimant stated that Mr Douth had addressed this point at the capability hearing on 30 June 2023, saying that he shows videos and asked similar questions of trainees at pass-out. The claimant challenged what Mr Douth had said as he had been communicating with other drivers who said that this was not true.
 - 96.4. It was agreed that the claimant would provide witness statements from Chris Howard and his work colleagues to support these allegations.

- 96.5. It was agreed that the appeal hearing would be reconvened at a later date to consider any additional evidence.
97. By email dated 4 September 2023 the claimant advised the respondent that his witnesses did not want to get involved. He did not ask the respondent to interview them. Mr Brown did not investigate these allegations. He did not interview Chris Howard or any of the witnesses named by the claimant at the appeal hearing before reaching his decision.
98. Mr Brown did investigate the allegation that Mr Douth had lied at the capability hearing about the training given and questions asked of other trainees by asking Mr Douth whether this was true. He confirmed it was. No witness statement was taken from Mr Douth. The claimant was not given an opportunity to challenge it.
99. Mr Brown proceeded to make his decision on the basis of the information provided at the appeal hearing and the evidence of Mr Douth.
100. In reaching his decision Mr Brown considered the documentary evidence provided, the information given at the appeal hearing and the evidence of Mr Douth in relation to the alleged lie. He determined that:
- 100.1. In relation to the complaint that the claimant had not been provided with any evidence prior to the meeting of 30 June . - Mr Brown noted that:
- 100.1.1. it was made clear that there would be reference to the Capability Management System during the meeting, which the claimant had access to so he could prepare as necessary.
- 100.1.2. The claimant would have also been aware that it was the Driver Assessments that were the main points of discussion, which he would have seen.
- In the circumstances he was satisfied that the claimant had sufficient access to documentation to prepare for the hearing.
- 100.2. In relation to the assertion that there was an inadequate investigation and that Mr Douth had focussed on the negative assessments in the CMS, Mr Brown rejected this ground of appeal on the grounds that Mr Douth, in assessing the competency of the driver, is going to review the things they cannot do. Mr Brown was satisfied that Mr Douth had reviewed the rideout notes and assessments as recorded on the CMS prepared by his team.
- 100.3. In relation to the CMS entry made by Mr Smith (see paragraph 85 above) 'Ian was not able to fulfil the requirements of the action plan and was dismissed from the role of the driver'. Mr Brown noted that:
- 100.3.1. This entry was made before the claimant was made aware of Mr Douth's decision.

100.3.2. this was upsetting for the Claimant, but this entry was after 30 June so was factually correct in that he had been dismissed from the role of driver, subject to appeal.

100.3.3. When this comment was added to the CMS the claimant had already had the opportunity to put his case forward with Mr Douch.

In the circumstances Mr Brown was satisfied that there was no pre-determination of the decision to dismiss

100.4. In relation to the complaint that Mr Douch had continued as his Driver Performance Manager (DPM), having already been dismissed by him, Mr Brown noted that:

100.4.1. due to staffing in the North, there was no option to go to another DPM;

100.4.2. there was no evidence to suggest that the claimant had at any point made any request to change to change managers or that the outcome would have been different with another DPM.

100.4.3. Ideally, they would have swapped the DPM but this was not possible.

100.4.4. Mr Douch in making his decision was relying on the assessments undertaken by the Driving Instructor (DI) and Driver Team Manager (DTM). He had no influence over the claimant's driving of the train or what the manager saw when assessing.

Mr Brown decided that changing the claimant's DI and DTM maintained impartiality as best as possible.

101. In reaching his decision Mr Brown considered all the CMS write ups (R224-236). He noted in particular that:

101.1. positive feedback was provided when things were done well. There was no evidence of an agenda from the DI or the DTM;

101.2. However, there were things the claimant did not do well, and these were more important as they go to whether he is competent to drive a train.

101.3. When the claimant's dismissal was overturned in March 2023 it was made clear there was an 80-hour plan in place and the claimant must be able to pass out at the end of this additional training;

101.4. During this 80-hour training the Claimant worked under a new DI and DTM and if he was genuinely unhappy with the notices placed on the CMS during that time there was the chance to challenge them at the time. He did not.

- 101.5. If he felt that the DI and DTM were being unfair in the lead up to his final ride out there was opportunity to challenge this, which he did not.
- 101.6. The action plan that was put in place as a final chance for the claimant to demonstrate competency. It clearly stated, “any DI or DTM intervention during the 80 hour extension specifically an intervention to prevent a safety related incident “ would mean that the claimant was unable to continue as a Trainee Driver.”
- 101.7. The Claimant needed to reach a standard whereby he could be trusted to drive a train without any supervision. By this point the Claimant had 480 hours and he still could not demonstrate that he could drive a train without supervision.

In these circumstances Mr Brown did not have any concerns with the decision that the claimant was not competent and could not pass out. The claimant was not at the level the respondent would expect him to be at for the number of hours that he had done. Mr Brown concluded that the claimant could not pass out and that the respondent had given him enough hours and chances to do so. The decision to dismiss was upheld.

102. The decision was confirmed by letter dated 18 September 2023 (R340). The appeal hearing was not reconvened to advise the claimant of the outcome. The letter includes the following:

The reasons for my decision is summarised below.

Point 1 – Incorrect procedure applied.

During the appeal you stated several points, beginning with incorrect procedure applied for the capability meeting. Luke Douch has confirmed that the initial meeting was not a formal capability meeting, and this was an informal discussion before the capability meeting was to be held with HR.

Point 2 - No evidence provided prior to capability meeting.

Following a review of the minutes from that meeting I believe all the information that was used during the meeting was taken from the competency management system, you have access to this and are familiar with this system.

Point 3 - Timescales for the process have not been appropriate.

It has been unfortunate that this process has taken a long time and appreciate that this is a stressful time for you. However, as explained on the day it has been difficult to coordinate everybody’s availability and you have been informed throughout the process about the reasons for these delays.

Point 4 - You have not received the minutes from the meeting on 30/06/23.

I apologise for the delay in receiving these minutes and Richard Dunscombe confirmed that he had now sent those minutes to Kev Ederle. It was agreed that you will have sufficient time to review these.

Point 5 - Your notice served was via email and no letter received.

During the appeal meeting you acknowledged that you had received the email. I believe this to be sufficient as you have received the notice in written format.

Point 6 - You felt that the investigation was inadequate and biased.

I have found no evidence to support this, there has been a change in line manager for you to ensure there was a balanced approach. There is no record of you requesting any changes to the line of management throughout the process.

Point 7 - The download from the assessment has not been provided regarding the over speed.

We agreed in the hearing that the speed was 80.7mph and not 81mph and you stated that you did not require the download. I note that the comment from Anthony is not correct regarding the distance travelled however, I believe that this does not detract from the fact that you were speeding during this assessment.

Point 8 - You believe that you have been the subject of incorrect reporting from DI's.

This was centred around DI Paul Williams and DTM Anthony Smith in particular. Having read the CMS entries I don't uphold the claim that these were the subject of incorrect reporting. I feel that you have had sufficient time to raise any issues with DI's and also note that Luke Douch has confirmed that you had agreed to a plan for a DI to be placed on other duties to complete your 80 Hrs plan. I also note that you have made no request to change DI throughout this 80 Hrs plan.

Point 9 - Inadequate training regarding the turn backs.

You stated that some of the points were never taught to you and there are different evaluations of turn back moves. Luke Douch has confirmed that turn back moves are discussed during the passout with trainees. Unfortunately, you have been unable to provide any evidence to support this point from other trainees.

Point 10 - You felt that the public display of the entry on the CMS predetermined the outcome.

I understand that the wording in the entry on the CMS may have caused you some concern however, as explained on the day this was to close down the cycle. I agree that the wording could have been more considerate however, this entry was made following the capability meeting and not before the meeting. I appreciate that you had not received the outcome letter however, I am satisfied that this did not predetermine the outcome of the meeting.

I believe that the return-to-work plan formulated on 27th March 2023 was a comprehensive plan that was constructed to achieve the desired outcome for you to passout as a driver, unfortunately you have not been able to complete this period

without intervention from the DTM. The plan states clearly that there will be no further extension.

In the light of these findings, I can confirm the following:

As you are currently involved in the recruitment process for another position, I agree to an extension to your notice period to enable you to complete this process. Your final day with the company will be 01st October 2023

This decision on your appeal is final and there is no further right of appeal under the company's Procedure.

103. During the course of his training the claimant did receive very positive feedback on his driving capabilities including the following:

103.1. At the completion of his training at Shrewsbury depot, he received the following feedback from his driving instructor (R412):

Ian, you have now completed your final week with myself prior to you returning to your home depot at Chester.

You have demonstrated excellent driving skills over the routes we have been over, driving calmly and professionally.

As we discussed you need more exposure to unit prep, coupling / uncoupling, and route knowledge over what will be your core routes.

103.2. On 19 January 2023 Mr K Haddock, driver instructor reported on CMS (R 220):

It has been a very bitty few weeks for Ian, this was due to Christmas, annual leave and training commitments for myself. (230 refresh 197 training and coupling) We have unfortunately only been able to get odd days here and there together.

However the time we have been able to work together has been very productive.

Ian has worked very hard maintaining his route knowledge and this has shown over the routes covered Wrexham - Bidston Chester - Holyhead Chester - Shrewsbury.

Ian has shown a good level of consistency in his driving where at all times he has been compliant with the companies PDP. Previously Ian's situational awareness has been in question, over the recent time together this has improved. Through frank discussions Ian now understands what is required

and how he needs to maintain the standards he can achieve every time he takes over a train.

Personal Attributes

Ian is as always smart and punctual to the task in hand. Compliant with Rules and Regulations and eager to improve his knowledge of Railway issues.

Feedback To Candidate

A bit of a stop start in your handling in recent weeks Ian. As with the majority of your training. However you have overcome these difficulties and continued to show resolve to achieve your goals. You can do the job to a high standard for that there is no question. Consistency is the aim. Maintain the standards you can achieve and long driving career beckons. Well done under the difficult circumstances of recent weeks.

103.3. This is consisted with the redacted email dated 19 January 2023 shown at SB49:

Since December/ Christmas and January his handling hours with myself have been very disjointed.... To be fair to Ian he has been driving really well. He now appreciates what is required and expected from a new driver, the standards he needs to maintain not just for pass out but for the rest of his driving career. He can do it and do it well, any slip ups will be down to his losing focus and as is with any driver you cannot legislate for that.”

104. On the termination of the claimant’s employment with the respondent a Leavers form was prepared (SB26) wrongly stating that the claimant had resigned.

The Law

105. The tribunal has referred to section 98 Employment Rights Act 1996 (ERA). It notes that the onus is on the employer to show the actual or principal reason for dismissal. Capability is a potentially fair reason for dismissal. It is sufficient that the employer proves that he honestly believes on reasonable grounds that the employee is incapable or incompetent. It is not necessary for the employer to prove that the claimant is in fact incapable or incompetent.

106. Once the employer has shown a potentially fair reason for dismissing, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The burden of proof is neutral. It is for the Tribunal to decide. Section 98(4) ERA 1996 states:-

“The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend

upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case".

The test of whether or not the employer acted reasonably is an objective one, that is, Tribunals must as industrial juries determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. There is a band of reasonable responses. The Tribunal must determine whether the employer's action fell within a band of reasonable responses. **Iceland Frozen Foods Limited v Jones [1983] ICR 17.** (Approved by the Court of Appeal in **Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827.** The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. **Sainsbury's Supermarkets Ltd v Hitt (above).** The tribunal bears that in mind and apply that test in considering all questions concerning the fairness of the dismissal.

107. In deciding whether capability dismissals fall within the band of reasonable responses a tribunal may consider whether:-

- 107.1. the respondent conducted a reasonable investigation of the alleged poor performance;
- 107.2. the specific allegation of poor performance was put to the claimant who was given full opportunity to state his case;
- 107.3. the respondent gave the claimant adequate training to assist him in improving his performance;
- 107.4. the claimant was aware of the standards required of him in his post;
- 107.5. the claimant was given a reasonable period of time to improve his performance ;
- 107.6. there was consistency of treatment;
- 107.7. the claimant given fair warning that his job was at risk if his performance did not improve;
- 107.8. the respondent took into account any mitigating factors ;
- 107.9. the respondent considered reasonable alternatives to dismissal.

108. In determining the reasonableness of an employer's decision to dismiss, the tribunal may only take account of those facts (or beliefs) which were known to the employer at the time of the dismissal.

109. Whether or not the employer acts fairly depends on whether in all the circumstances a fair procedure, falling within the range of reasonable responses, was adopted. The form and adequacy of a disciplinary enquiry

depends on the circumstances of the case. What is important is that, in the interests of natural justice, the employee can be given a chance to state his or her case in detail with sufficient knowledge of what is being said against him or her to be able to do so properly. **Bentley Engineering Co Limited Mistry [1979] ICR 2000.**

110. Defects in the original disciplinary procedures may be remedied on appeal whether the appeal is a re-hearing or a review of the original decision, depending on the circumstances of each case **Taylor v OCS Group Ltd [2006] IRLR 613 CA.**

111. The tribunal has considered the Acas Code, which sets out the steps employers must normally follow when handling disciplinary issues, namely:

- establish the facts of each case
- inform the employee of the problem
- hold a meeting with the employee to discuss the problem
- allow the employee to be accompanied at the meeting
- decide on appropriate action, and
- provide the employee with an opportunity to appeal.

112. The Introduction to the Acas Code states that it is designed to help employers and employees deal with disciplinary and grievance situations in the workplace and confirms that 'disciplinary situations' include 'poor performance'. However, it does not appear to cover 'qualification' cases. Nevertheless, an employer will still need to follow a fair and appropriate procedure in such cases and the Code establishes general standards of good practice.

113. In assessing compensation for an unfair dismissal, the tribunal must award such compensation as would be just and equitable in all the circumstances. The tribunal shall consider whether compensation should be reduced where a finding is made that following a fair procedure would have made no difference to the outcome. The tribunal should express the likelihood that dismissal would have occurred in any event in terms of a percentage chance. **Polkey v AE Dayton Services Limited 1988 ICR 142.**

114. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

115. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.
116. The claimant was dismissed and the effective date of termination was 1 October 2023.
117. The first question is what was the reason for dismissal. The tribunal has considered all the circumstances and in particular the following:
- 117.1. there is no satisfactory evidence to support the assertion that the claimant had been told, prior to February 2023 and his first capability hearing, that “no DTM at Chester would take him through to pass out”. Mr Chris Howard has not been called to give evidence. This is an extremely serious allegation. If, by February 2023, the claimant was aware of this alleged pre-determination that he would not be allowed to progress to pass-out, it is simply not credible that the claimant, who had the benefit of trade union representation throughout, would not have raised this prior to the appeal before Mr Brown in September 2023. This serious allegation was not included in the claimant’s written grounds of appeal against his dismissal in February 2023;
- 117.2. the claimant raised no complaint about unfair and/or prejudicial treatment by driving instructors or other members of the management team between his reinstatement in March 2023 and his final 80 hour assessment in May 2023;
- 117.3. it is not clear who was the author of the email referred to at paragraph 36 above. However, the fact that a manager expressed an opinion, in relation to a trainee driver on an Action plan “it is quite possible that he will not make pass out” is not satisfactory evidence of a pre-determination to dismiss that driver, whether or not he obtained the required level of improvement in performance under that Action plan. It is consistent with there being genuine concerns about the claimant’s performance;
- 117.4. There is no satisfactory evidence to support the claimant’s assertion that the driving instructors and/or driver team managers made false assessments of his driving ability or were writing their reports in a manner to secure his dismissal. Each assessment of his driving capabilities was loaded onto the respondent’s computer system – CMS. The claimant had the opportunity to challenge those assessments as and when they were made. He made no such challenge. He did not, prior to his final assessment in May 2023, complain that his driving instructors were making false assessments of his driving ability;
- 117.5. There is no satisfactory evidence to support the assertion that the respondent was determined to dismiss the claimant for poor performance when the claimant had demonstrated that he was competent to drive a train. The fact that the claimant did, at times,

receive positive feedback about his performance, does not mean that the claimant had demonstrated a good enough performance to proceed to the pass-out stage. There is clear evidence that the claimant did at times drive the train in an unsafe manner. Nevertheless, the respondent allowed the claimant to continue driving to give him further opportunity to demonstrate his skills. The tribunal refers in particular to:

- 117.5.1. The intervention by the claimant's driving instructor on 24 August 2022 (see paragraph 42 above). This was a clear breach of the Action plan (R191) in force at that time. No action was taken at that time to secure the claimant's dismissal from the driver training programme. The claimant continued to drive and receive further training;
- 117.5.2. The intervention by DI Williams in week ending 29 April 2023 (see paragraph 63 above) when the claimant failed to sound his horn at a whistleboard. The claimant accepts that this report was correct. This was a clear breach of the Action plan (R262) in force at that time. No action was taken at that time to secure the claimant's dismissal from the driver training programme. The claimant continued to drive and receive further training;
- 117.6. The assessments following the claimant's reinstatement are detailed and contain both criticism of, and praise for, the claimant's driving. They do not concentrate on merely the mistakes;
- 117.7. There is no satisfactory evidence to support the claimant's assertion that he was treated differently to other trainee drivers. The claimant has not called the colleagues he named at the appeal hearing to give evidence. The claimant has provided evidence as to the number of hours of training received by himself and other trainees. However, the claimant has provided no evidence of any other trainee, in broadly similar circumstances, being treated differently. The claimant provides no evidence, for example, of another trainee failing an assessment but being allowed to pass out and become a train driver;
- 117.8. There is no satisfactory evidence to support an assertion that Mr Smith made the decision to dismiss. The tribunal accepts Mr Smith's evidence that he did not take part in the decision. The entry on the CMS system on 3 July 2023 (see paragraph 85 above) was poorly worded. It had no bearing on the decision to dismiss, which was taken by Mr Douch;
- 117.9. The error on the Leaver's form (see paragraph 104 above) is not satisfactory evidence of bias against the claimant, or a determination by the respondent to dismiss for invalid reasons, or satisfactory evidence that the information on the CMS system about the claimant's driving is false or mistaken.
- 117.10. There is no satisfactory evidence to support the claimant's assertion that the dismissing officer, Mr Douch, was biased against the

claimant when reaching his decision to terminate the claimant's employment as a trainee driver in July 2023. The tribunal understands the claimant's argument that it was unfair for Mr Douth to make the decision to dismiss when Mr Douth had previously made a decision to dismiss the claimant on capability grounds and that decision was overturned on appeal. Was there, therefore, the risk that Mr Douth would not bring an independent judgment to bear, would not consider the new evidence, but would simply dismiss the claimant by way of confirmation of his earlier decision? The tribunal has considered all the evidence and finds that Mr Douth, when reaching his decision to dismiss in July 2023, did bring an independent judgment to bear. There is no satisfactory evidence to support an assertion that Mr Douth was biased against the claimant in any way, that he held some sort of grudge against the claimant, that he was determined to end the claimant's employment as a train driver simply because Mr Douth's previous decision to dismiss had been overturned on appeal, or for any other inadmissible reason. The tribunal notes in particular:

- 117.10.1. The claimant remained keen after his dismissal by Mr Douth in June 2023 to seek his assistance in finding alternative employment;
- 117.10.2. Mr Douth's request to see the claimant's grounds of appeal prior to giving the claimant assistance was based on a genuine concern that it may not be appropriate to meet with the claimant if he had made complaints of a personal nature against him and this was to be determined at an appeal hearing;
- 117.10.3. Mr Douth did provide assistance to the claimant and met with him on 6 September 2023;
- 117.10.4. Mr Douth's email to HR (see paragraph 89 above) was fully supportive of the claimant and directly contradicts any suggestion that Mr Douth was prejudiced against the claimant and/or had made a pre-determination to dismiss. Clearly, Mr Douth valued the claimant's personal professionalism and attitude. and was supportive of him obtaining alternative employment with the respondent;
- 117.10.5. The claimant did breach the terms of the Action plan in April 2023, when his driver instructor Mr Williams reported on CMS that he had to intervene because the claimant had missed a whistleboard and had to be told more than once to sound his horn. No action was taken at that time to bring the claimant's additional 80 hours training to an end: the claimant was allowed to continue and given further opportunity to achieve the standards required to enable him to proceed to pass out.

After considering all the circumstances the tribunal finds that Mr Douth held the honest and genuine belief that the claimant had, by June 2023, failed to demonstrate the necessary skills and qualities to complete his training and to become a qualified train driver. He based that belief on the assessments of the claimant's driving as reported on the respondent's

CMS system. It was for this reason that Mr Douth made the decision to terminate the claimant's employment as a trainee train driver.

118. The reason for dismissal was capability. That is a potentially fair reason for dismissal.
119. The next question is whether the respondent acted reasonably or unreasonably in dismissing for that reason. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair the tribunal reminds itself that it is not for the tribunal to substitute its view for that of the employer. The question is whether the respondent acted fairly within the band of reasonable responses of a reasonable employer in concluding that this employee had failed to demonstrate the necessary skills and qualities to complete his training and to become a qualified train driver and, following a period of redeployment, dismissing him.
120. The tribunal has considered all the circumstances including, in particular, the following.
121. The claimant asserts that the respondent failed to conduct a reasonable investigation of the alleged poor performance. The respondent, in reaching the decision to dismiss, relied upon the assessments which had been made of the claimant's driving in the period since the Action plan had been agreed following the claimant's reinstatement in March 2023. The tribunal finds that the respondent conducted a reasonable investigation by considering the reports of the claimant's driving on the respondent's CMS system. These were contemporaneous documents, prepared by the DI or DTM at the time that they witnessed the claimant driving a train. The reports are relatively detailed. The claimant had the opportunity to challenge the accuracy of those reports as and when they were made. The failure of the dismissing officer to interview the DI, Mr Williams, and DTM. Mr Smith, and prepare witness statements in advance of the capability hearing was not unfair. This would have been a fairly pointless exercise. It is highly probable that any witness statement would simply have referred to and confirmed the accuracy of the report made at the time. The claimant had failed to challenge the accuracy of the reports on the CMS when they were made. The respondent was reasonable in relying upon those reports as the evidence to be considered at the capability hearing. The claimant had not had the opportunity to challenge Mr Smith's CMS report of the 80 hour assessment on 18 May 2023 because he did not work after that date. However, the claimant did have a copy of that assessment, Mr Smith was in attendance at the capability hearing on 30 June 2023, when the claimant was able to challenge Mr Smith's account. The claimant was given the opportunity to provide his comments and explanations in relation each of the assessments in relation to which the claimant had been observed as having failed to drive to a satisfactory standard.

122. The respondent was reasonable in accepting that the reports of the claimant's driving, and in particular the 40 hour and 80 hour assessments, were accurate. The claimant had not challenged the accuracy of the earlier reports when they were placed on the CMS. In particular, he had not challenged the 40hr assessment. The respondent was reasonable in relying on the evidence of Mr Smith at the capability hearing that the claimant had been speeding during the 80 hour assessment. The claimant admitted that he had been speeding. There was a discussion as to the exact speed and a screen shot was provided which showed that the claimant had been driving the train at around 80mph on a track with a speed limit of 75mph. The claimant's assertion that he should not have been treated as failing the second Action plan, and the 80 hour assessment, because there was no intervention by Mr Smith is without merit. The report on the CMS system (see paragraph 71 above) includes the following:

I observed his speed increasing over the PSR of 75 mph and it reached 81mph Ian only applied his brake when he observed DI Williams, who was also in the cab point at the speedo in front of me on the second person side..... At the same time there was clearly 2 trackworkers on the opposite side of the track. Ian did not see them until he was approx 200 m away from them.

The respondent was reasonable in relying on this report in concluding that the claimant had demonstrated a loss of focus, that he slowed down as a reaction to Mr Williams pointing at the speedo, admitted speeding and seeing the trackworkers late. Further, and in any event, there had been an intervention by DI Mr Williams when the claimant had missed the whistleboard (see paragraphs 63 and 117 above). This took place during the currency of the Action plan and was a clear breach.

123. In all the circumstances the tribunal accepts that the respondent conducted a reasonable investigation of the alleged poor performance.

124. By letter dated 26 June 2023 (see paragraphs 75 and 76 above) the claimant was invited to a capability review hearing. He was told that Mr Douth would be considering his capability in the role of Trainee Train driver. He was warned that a potential outcome of the hearing was dismissal.

125. The claimant was fully aware that, following his reinstatement in March 2023, he had been given another chance to complete his training and become a qualified train driver. He had the benefit of trade union representation when the Action plan (see paragraph 56 and R260) was agreed. He was fully aware that he would be given 80 hours more driving, when his capability would be assessed. He was fully aware that he needed to pass the 40 hour and 80 hour assessments to progress to pass-out. The claimant was fully aware that he had failed the 80 hour assessment. When they finished the route and left the train Mr Smith informed the claimant that Mr Smith had judged the claimant as not competent, but that Mr Smith did not and could not give any inclination as to what would happen next – that

was for Mr Douth to decide. Mr Smith told the Claimant at the time, his view was that the claimant was not competent, as he would panic and showed a lack of focus and situational awareness.

126. The specific allegations of poor performance, for example, speeding and failing to sound the horn to alert people on the track, were not set out in the letter dated 26 June 2023. However, the claimant was fully aware that the capability hearing had been called because he had failed the 80 hour assessment. Prior to the hearing Mr Douth informed the claimant that he would be discussing the entries on the CMS system at the capability review hearing. The specific allegations of poor performance were discussed at the capability review hearing, when the claimant was given full opportunity to state his case.
127. The claimant was fully aware of the standards required of him in his post. Throughout his period as a trainee his driving was assessed, reports were prepared and feedback given indicating where mistakes had occurred and improvement was necessary. He had been the subject of 2 Action plans, which clearly set out what improvement was required. The claimant was aware that he needed to focus, that he needed to be fully aware of what was happening on the track, that he had to drive the train according to the safety standards set. He knew he should not speed, he knew he should sound the horn if people were on the track. He knew that he should sound the horn where whistle boards indicated that there was a foot crossing.
128. The respondent gave the claimant adequate training to assist him in improving his performance. The claimant raised no formal complaint about the standard of his training prior to his first dismissal in February 2023. One of the grounds of appeal in relation to that first dismissal was that he had been given inadequate/inconsistent training. However, there has been no satisfactory evidence about that ground of appeal, how it was dealt with at appeal. There is no reference in the appeal outcome letter to any finding that the claimant had been given inadequate training. There is some evidence, from the comments by the driving instructor at the Shrewsbury depot (see paragraph 103 above) that the training was “disjointed” and a little “bitty”. However, following his reinstatement in March 2023 the claimant was given a new driving instructor, who had considerable experience, and a new DTM. Adjustments were made to the routes driven by the claimant and driving instructor, and to the timing of those routes, to ensure that the additional 80 hours of training were spent on the routes on which the claimant would be assessed. The claimant raised no complaint about the quality of the training he received in those additional 80 hours prior to the capability hearing on 30 June 2023.
129. The claimant was given a reasonable period of time to improve his performance. At the time of his dismissal in February 2023 the claimant had undertaken some 400 driving hours to enable him to progress to the level of competency required for pass-out. This was well in excess of the number of driving hours that the respondent would expect a trainee to need to achieve the required level of competency. The average number of hours was 265

hours. On his reinstatement in March 2023 he was given a further 80 hours of driving to attain the required level of competency. That was agreed with the claimant when he signed the Action plan. There is no satisfactory evidence to support the claimant's assertion that 80 of the previous driving hours should have been discounted. In any event, even if they were discounted, this would have given the claimant a total of 400 hours, again far in excess of the average number of driving hours needed by a trainee to progress to pass-out. There is no satisfactory evidence that any other trainee driver was given more hours training than the claimant. Further, in reaching his decision to dismiss, Mr Douth reviewed the performance of the claimant over the last 80 driving hours, after the creation of the second Action plan. A reference was made in the capability hearing to a previous incident of the claimant failing to sound the horn at a whistleboard on a previous occasion. However, Mr Douth was merely noting that the claimant had stated to Mr Williams that he had missed a whistleboard before. Whereas Mr Douth thought that the fact that the claimant had missed a whistleboard earlier in his training could be overlooked, he decided that the incident with Mr Williams was very serious as he had missed the board and had to be told repeatedly before he sounded the horn. It was this missing of the whistle board in April 2023 which was taken into account in reaching the decision to dismiss.

130. The respondent acted reasonably in reaching the decision to end the claimant's training contract and not extending the training contract by giving the claimant more driving hours. The second Action plan was clear that this was a final chance for the claimant to demonstrate his capability. The claimant's argument that he should have been given 265 driver training hours within the Chester depot is not supported by any satisfactory evidence. There is no satisfactory evidence of any policy or practice that the minimum 265 hours trainee driving should be undertaken at the same depot. This was not argued by the claimant at the capability hearing or the appeal. A lot of the skills needed as a driver, for example, concentration, observance of speed limits, sounding horns for people on the track and at whistleboards, are needed on all routes. The claimant had to learn some different routes when he moved to Chester. However, some of the routes were common to the Shrewsbury depot. By the time of his dismissal in July 2023 the claimant had driven a total of 480 training hours, 260 of which had been driven on the Shrewsbury routes. Steps had been taken by the respondent to adjust the duties of the claimant's driving instructor, Mr Williams, to ensure that the additional training hours were spent on the routes on which the claimant would be assessed. The claimant had a total of 220 hours trainee driving at the Chester depot. The respondent acted reasonably in requiring the claimant to achieve the required level of competency at Chester depot within those number of hours.
131. The claimant was given fair warning that his job was at risk if his performance did not improve. He had failed the first Action plan created in July 2022 (R191). The claimant's assertion that he successfully completed that action plan because the original 3 week period had not been formally extended is without merit. He was dismissed because of his failure to

achieve the required standards following the implementation of that first Action plan. In any event, even if there was an error in the procedure with the first Action plan, that dismissal was overturned on appeal and the claimant was re-instated in March 2023. The first action plan was no longer operative from that point. The claimant knew that, on his reinstatement, he had been given a further chance to achieve the required level of competency. The second Action plan in March 2023 (R260), agreed with him when he was represented by the trade union, was clear. The claimant knew fully the consequences of failing his assessments and, in particular, of driver intervention. The second action plan (R260) clearly states:

8. Any Driver Instructor or DTM intervention during this 80 hour handling extension, or during pass out, specifically an intervention to prevent a safety related incident (e.g. SPAD, TPWS activation, speeding event), would mean Ian is unable to continue as a trainee driver

132. There is no satisfactory evidence of any inconsistency of treatment. There is no satisfactory evidence that any other trainee was treated differently in broadly similar circumstances. There is no satisfactory evidence to support the claimant's assertion that he had been asked questions which no other trainee had been asked, for which no training had been given. The claimant has adduced no evidence whatsoever of any trainee failing an assessment at the end of the training programme and then being allowed to progress to "pass-out" and qualify as a train driver.
133. The respondent took into account the representations made by the claimant about his performance. The claimant did not put forward any mitigating factors, did not assert that his ability to drive had been affected by the ill-health which he had suffered prior to his reinstatement.
134. The failure of the respondent to follow any return to work procedure following the claimant's long term sickness does not affect the fairness of the decision to dismiss. The claimant raised no formal complaint or grievance about this at the time. The claimant did not at any time say that he had a continuing medical condition which affected his performance and for which he required reasonable adjustments.
135. Taking into account all the circumstances the tribunal finds that the decision to terminate the claimant's employment as a trainee train driver fell within the band of reasonable responses. The claimant had been given adequate time to achieve the required competencies. It was reasonable not to give the claimant further time, bearing in mind, in particular, the way in which the claimant was failing his assessments. There were repeated issues with loss of focus/concentration, failure to observe signals, speeding, failure to sound the horn when safety demanded it. The claimant was fully aware that he needed to pass his final 80 hour assessment to enable him to progress to pass out. Nevertheless, on his own admission, he proceeded to drive the train in excess of the speed limit on that drive. The claimant could not provide a satisfactory explanation for that.

136. The respondent was reasonable in placing the claimant on a period of re-deployment, when he was supported in his search for an alternative role within the respondent company. The claimant makes no complaint that he was prevented from applying for any suitable jobs or that he was unsuccessful in any applications because of unfair or biased treatment by the respondent. The claimant does complain that Mr Douth was reluctant to meet with him to discuss alternative employment until after Mr Douth was aware of the grounds upon which the claimant was appealing the decision. However, Mr Douth did provide support, did meet the claimant.
137. The tribunal has considered whether the respondent followed a fair procedure. The respondent has no formal capability procedure. The tribunal has therefore considered the fairness of the procedure bearing in mind the requirements of the ACAS code of practice. The tribunal has considered all the circumstances and notes in particular:
- 137.1. The respondent relied on the written evidence of the reports of the rideouts and assessments as set out on the CMS system, which the claimant had the opportunity to challenge;
- 137.2. The respondent informed the claimant of the problem with his performance and the Action plan for a further 80 hours training was agreed. The respondent gave the claimant feedback on every rideout and assessment after the creation of the Action plan;
- 137.3. The respondent called the claimant to the meeting on 30 June 2023 with the employee to discuss the problem;
- 137.4. The claimant was allowed to be accompanied at the meeting and was given full opportunity to comment on the reports of the rideouts and assessments undertaken in the 80 hour period;
- 137.5. Mr Douth was qualified to act as dismissing officer. It was clearly custom and practice that decisions on action plans and decisions to dismiss were taken at his level as Driver Performance Manager. This may have been a technical breach of "Trainee-Driver Training procedure" (R 60-62), which suggests that such decisions should have been taken by the Head of Drivers. However, this point was not raised by the claimant, who was represented by the trade union throughout, at any point during his employment. It was not raised as a ground of appeal at either his first or second dismissal.
- 137.6. The dismissing officer considered all the evidence including the claimant's assertions before reaching the decision to end the claimant's employment as a trainee and to provide a period of redeployment to give the claimant an opportunity to find another alternative role;

137.7. The failure of the dismissing officer to call the claimant to a further meeting, at the end of the redeployment period, does not render the dismissal unfair, even though this had been anticipated at the time of the capability review hearing, even though HR had advised the dismissing officer to hold this second meeting. The claimant was fully aware that his employment as a trainee train driver had come to an end, was fully aware that his employment with the respondent would terminate if he failed to find an alternative role. The fact that the confirmation of the end of employment, the formal giving of notice, was communicated by email rather than by letter or at a final meeting does not render this dismissal unfair.

137.8. The respondent provided the claimant with an opportunity to appeal. The claimant was represented at that Appeal hearing and was given full opportunity to state his case. Mr Brown was qualified to conduct the appeal as he was Head of Drivers at the time. The fact that he was only temporarily seconded to that role and did not have many years' experience as Head of Drivers, that he had no experience acting as an appeal officer, did not mean he was not qualified. Mr Brown had several years' service with the respondent and had experience in disciplinary and grievance procedures.

137.9. Mr Brown addressed each of the 10 points of appeal and provided the claimant with a detailed written outcome. The fact that the appeal hearing was not reconvened to provide that outcome does not render this dismissal unfair. The parties anticipated that the appeal hearing would be reconvened because the claimant had agreed to provide witness statements from work colleagues. The claimant did not provide such witness statements. The claimant had been given full opportunity to state his case at the appeal hearing. A further hearing was unnecessary.

137.10. The failure of the appeal officer to investigate the claimant's assertions that firstly, he had been treated less favourably than other trainees, and secondly, that he had been told by another employee, Chris Howard, before his first capability hearing in February 2023, that "no DTM at Chester would take him through to pass out" does not render this dismissal unfair. The claimant failed to provide witness statements, from Chris Howard and the other work colleagues as agreed. The claimant did not, when informing the respondent that he would not provide the witness statements, ask that the respondent interview those witnesses. Further, and in any event, the issue for the respondent was whether the claimant was competent to continue with his training as a train driver and to achieve pass out. The evidence before the respondent, in terms of the assessment of his driving as reported on the CMS system since his reinstatement in March 2023, was the key issue. The issue was whether the reporting of the claimant's skills was accurate. There was no allegation or evidence of personal bias against the claimant by the authors of those reports, Mr Wilkinson and Mr Smith.

Whether or not other trainees could answer the same questions as asked of the claimant in the 80 hour assessment was not relevant to that assessment. Mr Brown did investigate with Mr Douth whether the claimant had been treated unfairly in being asked those questions on the 80 hour assessment and was satisfied that he had not been;

137.11. The failure of Mr Brown to reconvene the appeal hearing to report his investigation with Mr Douth does not render this dismissal unfair. The claimant, at the appeal hearing, was challenging what Mr Douth had said at the capability hearing. The claimant had had the opportunity at the capability review hearing to challenge the evidence of Mr Douth on this point;

137.12. The failure of the respondent to give the claimant a second right of appeal does not render this dismissal unfair. The claimant relies on "Trainee-Driver Training procedure" (R 60-62) to say that he was entitled to a second stage of appeal. However, the tribunal accepts the evidence of the respondent that the three stage appeal refers to the decisions taken by the Driver Trainers and Driver Team managers in relation to their assessments of the trainee driver's driving and their reports on CMS. It does not apply to the decision to dismiss. This makes sense as under the procedure the second stage of appeal is to the Driver Performance Manager and the third stage to the Head of Drivers. The claimant appealed the decision of Mr Douth, Driver Performance Manager, to Mr Brown, Head of Drivers. The policy does not provide a right of appeal above and beyond the Head of Drivers. There is no satisfactory evidence of any other employee being offered a second right of appeal against a decision to dismiss;

137.13. The delay in the capability review hearing and appeal procedure does not render this dismissal unfair. The claimant's employment was extended while the appeal was heard. He was not required to perform any duties, he received full pay while he looked for alternative work. He was not disadvantaged by the delay.

138. In all the circumstances the tribunal finds that the procedure was fair. It fell within the band of reasonable responses.

139. Viewed overall the tribunal finds that dismissal of the claimant fell with the band of reasonable responses.

140. The claimant was fairly dismissed.

In the alternative

141. In the alternative, if the tribunal is wrong on that, it has considered the so called Polkey principle. The question is whether following a different procedure would have made any difference to the outcome. The tribunal has considered all the circumstances and finds as follows:

141.1. If it was unfair that Mr Douth was the dismissing officer because he had made the earlier decision to dismiss, which had been overturned on appeal: The tribunal has considered whether there would have been a different outcome if a different manager, either another Driver Performance Manager or Head of Drivers from a different region, had been appointed to chair the capability hearing. The tribunal is satisfied and finds that there would have been no difference. The role of any manager in these circumstances was to assess whether the claimant was competent to proceed as a trainee driver. That would have involved an assessment of the claimant's driving capabilities as set out in the reports of the Driver Trainer and Driver Team Manager as recorded on the respondent's CMS. The reports are detailed and clear. They provide clear evidence that there continued to be genuine concerns about the claimant's ability to drive safely. There continued to be concerns about lack of focus, loss of concentration, speeding and failing to sound the horn when required to do so for safety purposes. Faced with that evidence any manager would have reached the decision to dismiss the claimant. Mr Brown acted as Appeal Officer because of a temporary secondment to the role of Head of Drivers. However, he is a Driver Performance Manager. He clearly demonstrates the likelihood that the claimant would still have been dismissed, had a different Driver Performance manager taken the place of Mr Douth. Mr Brown himself reviewed the evidence, considered the claimant's submissions on appeal, and considered himself whether the claimant was competent. He reached the same decision as Mr Douth: the evidence was that the claimant was not competent. The tribunal is satisfied that no other manager would have given the claimant another chance, would have given him more hours of training. There is no satisfactory evidence to show that the claimant was likely to change with yet further hours of driving. He knew full well that he needed to pass that final assessment. He knew full well that he should not speed. However, he did speed. If he was prepared to speed then, when he was being observed and assessed, then it was highly likely that he would continue to speed when driving solo. Any manager would have genuine concerns about the claimant's ability to drive solo in a safe manner.

141.2. If it was unfair that the appeal officer failed to investigate the claimant's assertions that firstly, he had been treated less favourably than other trainees , and secondly, that he had been told by another employee, Chris Howard, before his first capability hearing in February 2023, that "no DTM at Chester would take him through to pass out" : the tribunal has considered whether there would have been a different outcome if the appeal officer had carried out this investigation. Having considered all the circumstances the tribunal finds that it would have made no difference to the outcome. The claimant before this tribunal has failed to provide any satisfactory evidence in support of these assertions. He has not called any witnesses to the tribunal. It is highly

likely therefore that an investigation would have produced no evidence to support the assertions;

141.3. If it was unfair for the dismissing officer to fail to call the claimant to a reconvened capability hearing at the end of the redeployment period: the tribunal is satisfied and finds that calling the claimant to a reconvened capability hearing would have made no difference to the outcome. It was made crystal clear to the claimant that he would be dismissed after the end of the period of redeployment, if he had failed to find alternative work within the respondent company. Calling the claimant to a reconvened hearing served no purpose.

141.4. If the failure of the respondent to give the claimant a second right of appeal was contrary to the respondent' procedure and unfair: the tribunal is satisfied that a second right of appeal would have made no difference to the outcome for the same reasons set out at above. A second right of appeal would have involved another manager reviewing the same evidence to decide whether the claimant was competent enough to proceed in the role as trainee driver. There is no satisfactory evidence to suggest that a different manager would accept the unsubstantiated evidence of the claimant that the driver trainer and the driver team manager, Mr Williams and Mr Smith, had falsified their reports, had exaggerated the errors made by the claimant, that the claimant had in fact demonstrated the necessary skills and had passed the assessments. The claimant has failed to provide satisfactory evidence to support these assertions at this tribunal hearing.

Viewed overall, the tribunal finds that following a different procedure would have made no difference to the outcome: the claimant would have been dismissed.

Employment Judge Porter
Date: 25 September 2024

JUDGMENT SENT TO THE PARTIES ON

27 September 2024

For the tribunal