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THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE CAMPLING
MEMBERS: Ms J Forecast
Ms S J Murray

BETWEEN:

Mr J Masango — Claimant

AND

London Underground Limited — Respondent

ON: 1 February 2011, 3 May 2011 (Adjourned), 24 June 2011 and 11 July 2011 (In Chambers)

APPEARANCES:

For Claimant: Ms K Fudakowski of Counsel

For Respondent: Ms R Thomas of Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed.

2. A Remedy Hearing will be held.

REASONS

1. By a Claim Form presented on 14 May 2010 the Claimant complains of

unfair dismissal. The Respondent resists the claims.

2. The Claimant gave evidence on his own behalf. Mr Ian Williamson, Service Control Manager, and Mr Dean Horler, Performance Manager, gave evidence for the Respondent.

3. There was produced to the Tribunal an agreed bundle of documents comprising 149 pages.

4. The matter was originally listed for a Hearing on 1 February 2011 but since there was insufficient time to hear the case it was adjourned part heard until 3 May 2011. On the day of the resumed hearing one member was unavailable. The Employment Judge explained this to the parties and asked them whether they wished to consent to the remainder of the case being heard and determined in the absence of that member in accordance with Regulation 9(3) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004. The Employment Judge explained that the member in question was from the panel appointed after consultation with the organisations representative of employees. There was an initial misunderstanding as the Claimant's representative had understood the member to be from the panel representative of employers. This was clarified by the Employment Judge and there was an adjournment to allow the parties to consider the matter. After the adjournment the Respondent consented to the proceedings going ahead. The Claimant did not consent to the proceedings going ahead in the absence of the member and the Hearing was therefore adjourned to 24 June 2011 and subsequently In Chambers to 11 July 2011.

5. At the end of the Hearing both parties' representatives helpfully provided written closing submissions as well as making oral submissions. The Claimant's representative also submitted a list of acronyms and a chronology which was not agreed by the Respondent. The Claimant's representative also submitted a copy of the case of Chamberlain Vinyl Products Ltd v Patel [1996] ICR 113.

Issues

6. The issues as agreed by the parties at the outset of the Hearing are as follows:

   6.1 What is the reason for the dismissal? Is it conduct as submitted by the Respondent?

   6.2 If the reason for the Claimant's dismissal was by way of conduct, whether the Respondent had a reasonable belief in the Claimant's conduct on reasonable grounds following a reasonable investigation.

   6.3 Whether the Respondent acted procedurally fairly.

   6.4 Whether the decision to dismiss fell within the range of

reasonable responses open to a reasonable employer.

6.5 If the Claimant is successful the Tribunal will consider the following issues relating to remedy.

6.5.1 Whether a deduction should be made as a result of the *Polkey* principle, i.e. if the Claimant was unfairly dismissed due to procedural failings should a deduction be made from any award to represent the possibility that the Claimant would have been dismissed in any event.

6.5.2 Whether the Claimant caused or contributed to his own dismissal.

6.5.3 Whether there should be any adjustment to any award for failure to follow the ACAS Code of Practice.

Any other issues relating to remedy would be dealt with separately at a separate hearing.

The Facts

7. From the evidence that it has seen and heard the Tribunal makes the following findings of fact on the balance of probabilities. The Claimant commenced employment as a Train Operator with the Respondent on 30 September 2002. The Claimant's role was to drive trains on the underground system. At the relevant times he was a train driver on the Victoria line. London Underground Limited is a well known organisation which is responsible for providing underground train services in London.

8. On 9 August 2009 the Claimant was involved in a Signal Passed At Danger ("SPAD") incident. Whilst the SPAD was being investigated from 10 August until 13 August the Claimant was required to report for duty but not provided with any work. He sat in the mess room awaiting instructions. On 14 and 15 August the Claimant was on rest days.

9. On Friday 14 August an e-mail was sent from a Mr Da Costa to the Duty Manager Trains (DMTs) Brixton and DMT Seven Sisters regarding the Claimant and the incident on 9 August 2009. The e-mail states that the Claimant had not been "stood down" but had been relieved of all driving duties. The recipients were advised that the Claimant should continue to book on for his normal duty start times unless a change was made following an instruction from either of the Trains Operation Managers as a decision on the matter was currently pending. A reply was received from Mr John Collins, Seven Sisters DMT, and copied to the DMT at Brixton and DMT at Seven Sisters. This reply stated that the Claimant was on rest days on Friday and Saturday working on Sunday but that there was a shut down and he had an age medical scheduled on Monday [17 August]. Mr Collins said that he had told the Claimant to come to Brixton after his Occupational Health appointment. Later on the same day Mr Carl Painter, Train Operation Manager ("TOM") Brixton,

replied to Mr Collins, Mr Da Costa and the DMT Brixton and DMT Seven Sisters saying that:

> *"Having reviewed this case I am satisfied that James can take on normal train duties from the first and earliest opportunity. He needs to be told that the investigation is not finished however and may be called for further interviews etc.*
>
> *Please can a log item be made to this effect and he be informed on Sunday when he returns from rest day."*

10. On 17 August 2009 the Claimant had an appointment with Nurse Christian Overal in the Respondent's Occupational Health section at the end of which the Claimant was provided with a copy of a handwritten memo. The Tribunal were shown a copy of the memo which appeared at page 21 and 21A of the bundle. The memo is headed Re: Re-examination by Nurse (tests). The nurse had written the following:

> *"I saw Mr Masango in clinic today. I have referred Mr Masango to a counselling and trauma service. He should undertake no train operating, no track work and no making of safety critical decisions. This restriction is temporary. I anticipate that once Mr Masango's work issues are resolved he will be able to make a graduated return to his duties."*

11. The Claimant then returned to his station and gave the copy of the handwritten memo to his duty manager.

12. On 18 August 2009 the Claimant reported for duty. The Claimant attended a meeting with Mr Painter and discussed with him the Occupational Health memo amongst other issues. There is a dispute between the parties as to the content of the meeting. There was a file note of the discussion made by Mr Painter which was written some time after on 7 September 2009 at page 21B of the bundle. The file note records that the Claimant had told Mr Painter that he felt fine to drive, that Mr Painter had told the Claimant that the SPAD investigation had concluded over the weekend and that the physical evidence did not match the Claimant's explanation and therefore a Corrective Action Plan ("CAP") would be put in place. The Claimant had discussed the memo from Occupational Health with Mr Painter and the Claimant was surprised that the nurse had said that he could not drive. The Claimant's evidence was that at the meeting on 18 August 2009 he had asked for trade union representation but had been told that the meeting was informal and it would not be needed. He said that Mr Painter appeared not to be aware of the Occupational Health medical report. His evidence was that Mr Painter asked him on what grounds the doctor had said that he was not fit to drive. The Claimant denies that he said that he felt he was able to drive. The Claimant fully refuted that Mr Painter told him the investigation was over and that he was to be on a Corrective Action Plan.. The Claimant says there was no discussion about a meeting with a DMT. The Claimant's evidence was that he was shown a technical

report on Mr Painter's computer which was inconclusive, and no written outcome had been notified to the Claimant of a CAP. Having fully considered the evidence of both the Claimant and the written evidence of Mr Painter we find that the investigation into the SPAD had not been concluded by this stage. We accept the Claimant's evidence that when he saw a Bulletin dated 27 August 2009 this was the first formal conclusion that he had seen of the investigation into the SPAD. We noted that the full and final formal report into the SPAD, at pages 20A-D of the bundle, was dated 18 September 2009. At the meeting Mr Painter agreed that the Claimant could have a day off. It was agreed that Mr Painter would contact Occupational Health.

13. The Claimant then returned to driving duties on 23 August 2009. By this time Mr Carl Painter was on absent from work on two weeks' annual leave.

14. On 27 August 2009 Mr Andy Brown, TOM Assistant Brixton, e-mailed Ms O'Leary, Medical Administrator with the Respondent, as follows:

> *"Hi Dee, as per telephone conversation re above please could you arrange to fax a copy of the memo when completed re above restriction so that DMs can be aware of his situation the fax number is..."*

15. In response Ms O'Leary replied that she would have to check with Nurse Overal before providing the information requested. Later on 27 August 2009 an e-mail was sent from Mr Chris Barbas, Duty Manager Trains, to Ms O'Leary stating that he understood from Mr Brown that the Claimant should be restricted from train operating and track work and checking to see whether this was correct as he was due to start work later that day. On 27 August 2009 Mr Painter e-mailed from his holiday that the Claimant should not be allowed to be restricted from train operating and track work as "I sorted out that he was fine to return to work last week - any problems let me know". Later on the same day Mr Barbas e-mailed Mr Painter and copied to Mr Vasquez-Castro the following:

> *"Carl, sorry to bother you with this...I had a phone call from Jamie following a conversation he had with Andy last night regarding James Masango; I informed Jamie that as far as I was aware, James was fit to pick up his duties and that he attended an age/fitness medical on 17 August. No information stating he could not resume his duties was forthcoming from LUOH [London Underground Occupational Health]. Jamie put him on a train. Andy has been verbally advised by LUOH that the medical revealed a problem that should restrict James from carrying out his duties, however no advice from LUOH has been received. Jamie and I are prepared to put him on duty until you state otherwise, but we would appreciate an understanding of what to do if a memo/report comes from LUOH stating James is to be restricted."*

16. Mr Painter replied on 27 August 2009 the following:

> *"I sat down and spoke at length with James and he is fine to return as the SPAD issue was resolved and he felt fine to do so. This conversation took place last week and he drove trains without any issues at all after this.*
>
> *He is okay to drive – what I believe is that has happened is that LUOH are unaware of this and have sent this out following the meeting that he had with them before I had the above discussions where James was okay to return."*

17. The bundle contained two further documents headed London Underground Occupational Health Medical Advisory Team memo. These memos were typed rather than handwritten. We were not told the reason why these came into existence. They were headed confirmation of handwritten memo dated 18/08/09 and dated themselves 27/08/09. The first memo states the following:

> *"After discussion with my senior, there is a slight change in the memo dated 17/08/09.*
>
> *We saw Mr Masango in clinic today to review his ongoing medical condition. His medical condition is well stabilised on medication and is regularly reviewed by his GP.*
>
> *I have referred Mr Masango to our OH Counselling Service to help his situation. If you have any further concerns please contact our line doctor."*

18. The second memo states the following:

> *"After discussion with my senior, there is a slight change in the memo dated 17/08/09. We saw Mr Masango in clinic today to review his ongoing medical condition. His medical condition is well stabilised on medication and is regularly reviewed by his GP. However Mr Masango reported to me that he had a recent incident at work which is under investigation. Mr Masango tells me that he has not been allowed to perform his normal duties and he "does not know what is going on". He feels stressed because of his situation.*
>
> *I would not recommend that he resumes his normal duties at present until his current management issues are resolved. I have referred Mr Masango to our OH Counselling Service to help his situation. If you have any further concerns please contact our line doctor."*

19. On 30 August 2009 the Claimant was on duty at Brixton when he saw a Victoria Line Bulletin dated 27 August 2009 regarding two SPAD incidents. The Bulletin indicated that the investigation had concluded

that a signal was passed at danger in the case of the Claimant and another incident involving a different driver at the same signal. However the Bulletin did include a statement that *"there was no suggestion that we do not believe the train operators involved in these incidents but on the basis of the evidence recorded the signals were operating correctly"*. It was said that both of the incidents would be reviewed by the SPAD focus group in a couple of weeks (page 81 of the bundle). After reading the Bulletin the Claimant was approached by DMT Gilbert on the platform who tried to arrange with the Claimant a time to discuss a Corrective Action Plan. According to a brief e-mail statement from Mr Gilbert obtained during an adjournment of disciplinary proceedings, the Claimant seemed confused. Mr Gilbert told the Claimant that he, Mr Gilbert, may have misunderstood the situation. The Claimant's evidence was that the conversation became heated and that Mr Gilbert had said that he would issue an "item" as a result of the delay to the train that the discussion was causing. The claimant commenced to drive his train.

20. On the same train journey from Brixton, at approximately 1800 hours the Claimant was involved in a wrong side door incident at Warren Street Station. The Claimant was driving the train and stopped at the station. On that day the station was closed and the doors should not have been opened on either side of the train. The Claimant reported by radio to the Service Controller that he had opened the doors, without specifying which side. A passenger who was an off-duty member of London Underground staff reported in independently to advise a wrong side door opening incident. A wrong side door incident is an occurrence when the train doors open on the incorrect side, i.e. the track side rather than the platform side, which represents a significant safety risk to passengers.

21. The Victoria line is the only line on London Underground which does not have an automatic mechanism that stops the driver from being able to open the door on the wrong side at the station. This means that a driver of a train on the Victoria line can potentially open doors on the wrong side when the train has stopped at a station. On other lines it is only possible that the driver can open the wrong side doors if the automatic mechanism is faulty. It is because of the safety risk that the Respondent operates a specific procedure which train operators are required and trained to follow in the event that they open train doors on the wrong side.

22. The Tribunal were given a copy of the procedure which is outlined in section 14 of Rule Book 7 (pages 41 – 43). In summary if the train operator has opened the doors on the wrong side, he or she must:-

- Immediately close the doors.
- Tell the controller.
- Request the traction current to be switched off (for the line or lines concerned).

- Sound a whistle to attract the attention of station staff.
- Open the doors on the platform side of the train.
- Try to find out if any customers have fallen from the train.
- Once the controller has been made aware of the incident he or she must stop all trains entering the affected area and tell the station supervisor
- To attend the incident and
- To de-train the customers.

23. At 18.25 on 30 August 2009 the wrong side door incident was investigated by Mr Johnson who interviewed the Claimant. We were given written notes of the interview which had been signed by Mr Johnson and the Claimant. They record that the Claimant said that when the train stopped he accidentally pressed the "doors open" button. He had then got confused about which side doors had opened and pressed the "doors close" buttons on both sides. He said that he tried the platform side first and then the track side which required him to move sides in the cab. Eventually the pilot light came on meaning that the train could now move. He then contacted the line controller and informed him that he had opened the doors at a closed station. His statement did not mention which side the doors were that he had opened. He said that he was confused. He was instructed by the controller to proceed to Seven Sisters where he was removed from the train to have the interview with Mr Johnson.

24. On 3 September 2009 the Claimant was referred to temporary alternative duties (see page 25L). The form referring the Claimant to temporary alternative duties has a section headed Case History that refers to the fact that the Claimant had been previously restricted by London Underground Occupational Health to non-track operating duties, no track work and no making safety critical decisions. It was said that he should continue with this restriction whilst referred to temporary alternative duties and noted that he was on medication for high blood pressure.

25. On 3 September 2009 Nurse Overal sent an email to Mr Malcolm Pinnal, Train Operations Manager at Seven Sisters, which states that he had had received a memo from Mr Painter dated 27 August 2009 stating that the Claimant had returned to full duties after his discussions with him and that his work issues have now been resolved. Nurse Overal goes on to say:

> *"If this is the case and neither yourself or Mr Masango have any concerns about fitness to work and he feels well then he can resume normal duties. I would recommend that you interview Mr Masango, if not already done so to see if there are any concerns*

and if there are to contact us."

26. This e-mail was in response to a request from Mr Pinnal who had stated that he understood that Nurse Overal had seen Mr Masango on 26 August and judged him as not fit for train operating duties and asked for confirmation as to whether this was still in pace. He also asked him to confirm when it was sent and to whom as he had only received it on his desk on 2 September and the Claimant had been driving all weekend.

27. Mr Johnson carried out an investigation into the incident. Mr Johnson produced a report for the disciplinary panel dated 20 November 2009. The report included the following appendices:-

(1) Appendix A – London Underground Limited Code of Conduct.

(2) Appendix B – Section 14.2 of Rule Book 7.

(3) Appendix C – An e-mail statement from an off duty member of staff on train.

(4) Appendix D – connect radio download of discussion between train operator Masango and the service controller.

(5) Appendix E – First fact finding interview on 30 August 2009.

(6) Appendix F – Second fact finding interview on 28 September 2009.

(7) Appendix G – CCTV summary.

(8) Appendix H – Med screen of paperwork and results.

(9) Appendix I – Statement from TOM Carl Painter re meeting from 18 August 2009.

(10) Appendix J – Invitation to attend a company disciplinary interview

28. The Claimant was provided with a copy of the disciplinary investigation report and invited to attend a company disciplinary interview on Tuesday 1 December which was then re-arranged at the Claimant's request for 21 December 2009. The Claimant was given notice that he was to deal with the following matter:

"gross misconduct in that on 30 August 2009 at approximately 18:03 whilst in charge of train 246 on the northbound Victoria line at Warren Street station (which was closed), you opened the doors of train 246 on the wrong side of the train (i.e. on the track side not on the platform side). Furthermore you failed to follow due process in that you had failed to advise the service controller that you had opened the train doors on the wrong side before departing the platform" this is contrary to sections 3.1.1, 3.3.1 and 3.3.3 of the London Underground Limited Code of Conduct, issue date 27.01.2003 and section 14.2 of Rule Book 7"

The Claimant was advised that the hearing may result in the sanction including that of dismissal and that he had a right to bring a trade union representative with him.

The Claimant attended the Company Disciplinary Interview (CDI) on 21 December 2009. He was represented by Mr Glenroy Watson, his trade union representative. The meeting was chaired by Mr Ian Williamson with Ms Alana Stewart as second chair. The meeting was attended by Ms Irene Burton, a People Management Adviser from HR, and two observers. The notes of the meeting are at pages 71 – 75 of the bundle. At this meeting it was established that several relevant pieces of information were not available and the meeting was adjourned in order to obtain these. This information included the following:

- Recordings of conversations around the incident.
- Correspondence from Carl Painter to LUOH after the meeting on 18 August.
- Any correspondence between 18 August and 5 November giving instructions to DMTs.
- A notice relating to a SPAD incident at signal BL6 on the Victoria line.
- Any documentation relating to James Masango's referral to light duty.
- James Masango's representative requested information to clarify the nature of the two medical examinations.

29. The reconvened disciplinary meeting took place on 4 February 2010 and continued on 5 February 2010. Ms Burton also obtained further information from London Underground Occupational Health dated 12 February 2010. This e-mail stated the following:

> *"Your e-mail of 10 February has been passed to me as Christian Overall is currently on leave. I reviewed this man's notes. He was seen on 17 August 2009 by our Nurse Christian Overall and at that point the advice was that he could continue restricted duties. We subsequently received an e-mail from Carl Painter on 27 August stating that Mr Masango had returned to full duties; and this was following a discussion that it appears Carl had with Mr Masango."*
>
> *On 3 September 2009 an e-mail was sent to Malcolm Pinnal from Christian (Malcolm had contacted Christian asking for clarification) and this e-mail states that Mr Masango had returned to full duties and if there were no concerns about fitness to work then he could continue on normal duties. At that point the manager was advised to interview Mr Masango if this had not already been done; to see if there were any concerns and if there were concerns then they were to contact us for further advice."*

30. Mr Williamson also obtained information relating to the individual who had the SPAD at the same signal as the Claimant as the Claimant at that time had raised a complaint of discrimination in that he had been treated less favourably than the other individual who had the SPAD. Mr Williamson also reviewed similar cases with Ms Burton the PMA to ensure that his decision would be consistent with the decisions made in past cases.

31. Mr Williamson considered all the information available to him and concluded that the charge of gross misconduct was proven and decided to summarily dismiss Mr Masango. Mr Williamson confirmed his decision in writing on 18 February 2010 (see pages 120 – 126 of the bundle).

32. The Claimant appealed against the severity of the sentence. On 5 March 2010 a Company Disciplinary Appeal ("CDA") was held which was chaired by Mr Dean Horler, Performance Manager. The note of the appeal hearing appear at pages 128 – 135 of the bundle. At the appeal hearing the Claimant was represented by Mr Oliver New, his trade union representative who submitted that the sanction was too severe and there had been a failure of procedure by the Respondent both during and before the CDI. Mr Horler's evidence was that at the appeal meeting the Claimant had raised the issue of the memorandum from London Underground Occupational Health and that he appealed against the severity of the sentence given, for example, that his conduct record during his employment with London Underground Limited had been good. He also alleged that suitable procedures had not been followed.

33. Following the CDA Mr Horler had various discussions with Ms Burton regarding the procedural issues and concluded that the CDI had been conducted according to procedures on all points. His evidence was that he was not concerned with the Claimant's objection to him hearing the appeal as he did not work directly with the train's teams and so his impartiality was not compromised. He was also not concerned that a Corrective Action Plan had not been agreed with the Claimant following the SPAD incident. Mr Horler sent a letter to the Claimant dated 9 April 2010 confirming his decision to uphold the decision to dismiss and setting out his findings (see pages 136 – 137). There is no reference to the issue relating to the Occupational Health report in that letter.

34. By a letter dated 21 April 2010 Mr Oliver New requested a Director's Appeal on behalf of the Claimant. The letter of appeal refers to the fact that the Claimant had been instructed by London Underground Occupational Health not to carry out safety work. The appeal goes on to say that Mr Masango was working under protest when the wrong side door opening incident occurred. The Respondent did not respond to this appeal and the Claimant submitted a complaint of unfair dismissal.

The Law

35. The law relating to unfair dismissal is contained in the Employment

Rights Act 1996. Section 98 of the Employment Rights Act 1996 provides that an employer must show that the reason for the dismissal is one of a number of permitted reasons. It was submitted by the Respondent that the reason for his dismissal related to the Claimant's conduct. If this is established a Tribunal is required to consider whether or not the dismissal was fair in all of the circumstances, in accordance with the provisions in section 98(4) Employment Rights Act 1996 which provide:

The determination of the question whether the dismissal is fair or unfair (have in regard to the reason shown by the employer):

(a) depends on whether in the circumstances, including the size and administrative resources of the employers' undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

36. A Tribunal should not, when considering these issues look at what they would have done, but they should decide on the basis of the range of reasonable responses test, what the employers actually did. The appropriate test is whether the dismissal of the Claimant lay within the range of conduct that a reasonable employer could have adopted. The Tribunal must adopt an objective standard and must not substitute its own view for that of the employer (Iceland Frozen Foods v Jones 1982 IRLR 439, EAT as confirmed in Post Office v Foley (2000) IRLR 234). The decision to dismiss itself must also be one within the range of reasonable responses, open to the employer. In applying section 98(4) of the Employment Rights Act 1996 the Tribunal are not to substitute their own view for that of the employer, the question is whether the employer's decision to dismiss fell within the range of reasonable responses open to a reasonable employer, or whether it was a decision, no reasonable employer could have made in the circumstances. That approach was re-emphasised more recently by the Court of Appeal in London Ambulance Service NHS Trust v Small (2009) EWCA Civ 220.

37. In the case of British Home Stores v Burchell 1978 IRLR 379 the EAT held that where an employer suspects that an employee has committed an act of misconduct, a dismissal can still be fair, provided that the employer had a genuine belief that the employee had carried out the act of misconduct; had reasonable grounds upon which to base that belief and had carried out a proper investigation.

38. The Court of Appeal in Sainsburys Supermarket v Hitt [2002] EWCA Civ 1588 held that the "range of reasonable responses test" applies as much to the question of whether the investigation into suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. It is necessary for a Tribunal to apply

the objective standards of the reasonable employer to all aspects of the question whether an employee was fairly and reasonably dismissed. This does not mean that no stone must be left unturned during that investigation. The purpose of the investigation is not to establish whether or not the employee is guilty of the alleged misconduct, but whether there were reasonable grounds for the employer's belief that there had been misconduct by the employee to which a reasonable response is to dismiss. The test to be applied in the case of suspected misconduct is not whether more could have been done or further investigation should have been carried out, but whether the investigation which has been carried out, could be regarded as a reasonable one.

39. In the case of in Chamberlain Vinyl Products Ltd v Patel [1996] ICR 113 the EAT gives guidance on the issue as to whether an investigation of mitigation is required:

"Perhaps of greatest assistance to the Appellant is Lord Bridge's brief summary of the employer's duty to be found in the case of Polkey v A E Dayton Services Ltd [1988] ICR 142. At page 162H Lord Bridge said:

"... in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;"

We do not understand Lord Bridge there to have implied that the employer's duty is to be strictly limited to hearing the employee's mitigation and that his duty of investigation is to be strictly limited to the issue of guilt or innocence. In the great majority of cases, that will be an adequate procedure but, in our view, there may be cases where some aspect of the background needs to be investigated in order to put the misconduct into proper context. In those circumstances, an Industrial Tribunal may, in our judgment, be justified in criticising the employer for failing to investigate a point raised in mitigation by the employee. We think that this is such a case where, on the view the Industrial Tribunal took of the facts, they were justified in so doing."

40. The burden of proof is neutral as to the reasonableness of the dismissal (the Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09/ZT).

41. Where a dismissal is found to be unfair, but a Tribunal is of the opinion that there is a chance that the Claimant would have been dismissed in any event, then a deduction can be made from any compensatory award, as a result of the principle in Polkey v Dayton Services 1988 ICR 142.

42. An award of compensation may also be adjusted to take into account contributory fault under section 122(2) Employment Rights Act 1996, and section 123(6) Employment Rights Act 1996. The Claimant's conduct

must be "culpable or blameworthy." In Nelson v BBC (No.2) 1980 ICR 110, the court said such it could include conduct that was 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances'.

43. Section 207A of the Trade Union and Labour Relations Consolidation Act 1992 provides that an award can be reduced or increased, where a party has unreasonably failed to comply with the ACAS Code of Practice.

Conclusions

44. The Tribunal was referred to a considerable amount of documentation and detail to which it has had careful regard before reaching its decision. The Tribunal has not referred to all of the detail in these Reasons but we have tried to provide the parties with a reasonable account of why they have won or lost.

45. With regard to the issue of the reason for dismissal the Tribunal is satisfied that the reason the Claimant was dismissed is because of his conduct in that the Respondent believed that he opened the doors of a train on the wrong side of the train and subsequently failed to follow the proper procedure in that he did not advise the controller that he had opened the train doors on the wrong side before departing the platform. Mr Williamson's evidence was that he dismissed the Claimant not because the doors had been opened on the wrong side but because he had failed to properly communicate that to the controller. He accepted that mistakes are made but in this case he was of the view that the Claimant had attempted to cover up his mistake by not correctly reporting that the doors had been opened by himself on the wrong side.

46. The Tribunal then considered whether the Respondent had reasonable grounds for that belief following a reasonable investigation. We considered the investigation and in particular whether the deficiencies in the original investigatory report produced by Mr Johnson were made good by the adjournment of the hearing and the further investigation by Mr Williamson. In our view the original investigatory report had not adequately covered the issues raised by the Claimant in particular in relation to the London Underground Occupational Health reports. The Claimant's case is that the investigation undertaken by the investigating officer Mr Johnson and subsequently by Mr Williamson was not reasonable in that it failed to properly deal with whether the Claimant should have been driving on the day in question, why the Occupational Health memo had been changed and did not properly scrutinise the account of Mr Painter against the account of the Claimant. We were mindful that the investigation does not have to be perfect. There is no requirement for the Respondent to investigate every detail of the case against the Claimant. We carefully considered the points raised by the Claimant's representative and we also took into account the case of Chamberlain Vinyl Products Limited v Patel [1996] ICR 113 which provides that in some cases of misconduct it is reasonable for the employer to investigate mitigation as opposed to the simple issue of guilt

or innocence. We were satisfied that in this case the employer had done enough investigation as was reasonable in these circumstances. Whilst there were more issues which could have been further investigated we were of the view that sufficient investigation had been carried out to enable the Respondent to form a reasonable belief that the Claimant had committed the act of misconduct in question and to have an adequate understanding of the background to the matter to put it in context.

47. We then went on to consider whether the Respondent had acted procedurally fairly. We were satisfied that the Respondent had done so. There had been an investigation, the Claimant had been invited to a disciplinary hearing and advised told that one possible outcome was his dismissal. He had been invited to bring his trade union representative to the disciplinary hearing and the appeal hearing and had done so. The Claimant had been given notice of the case against him and been given a right of appeal. We did have a concern that some of the information acquired by Mr Williamson the dismissing officer had been acquired after the disciplinary hearing, but this had not been raised by the Claimant as an issue and we were satisfied overall that the procedures were fair.

48. We then considered the substantive decision to dismiss and particularly whether it was in the range of reasonable responses of a reasonable employer in the circumstances. The crucial question for the Tribunal is whether the employer's response to the facts before it was reasonable. We reminded ourselves of the words of section 98(4) i.e.

"the determination of the question whether the dismissal is fair or unfair ...depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

We noted that the Respondent had considered the way that previous cases had been dealt with. The Respondent had been aware of four other cases of wrong side door opening. In two of these cases the drivers had been summarily dismissed, in one a train operator had been given a suspended dismissal and in another the train operator had had their licence revoked. The Tribunal also considered that the disciplining officer had accepted that if the Claimant had have been medically restricted the outcome of the disciplinary hearing would have been different. Mr Williamson's evidence was that he dismissed the Claimant because he did not properly notify the controller about the wrong side door opening to enable safety measures to be taken. It was not the case that he was dismissed as a result of the wrong side door opening per se. However it is necessary for the Respondent to consider the totality of the situation. In this case the disciplinary officer and the appeals officer were both aware that there was an Occupational Health issue. In our view the Respondent's conclusion that the Claimant's conduct warranted dismissal was not one which any reasonable employer would reach on the evidence presented, in particular in the light of the Occupational

Health report which prior to the incident gave unambiguous advice that the Claimant should not be making safety critical decisions or driving trains. The evidence was that Mr Painter had overridden that advice without consultation with Occupational Health on the matter. There was no objective evidence of the Claimant's work issues having been resolved and of him being fit to resume driving. The 27 August e-mails from Managers trying to establish the nature of the advice from Occupational Health showed that the capacity of the Claimant to drive safely continued to be a live issue for the Respondent after the meeting between the Claimant and Mr Painter. Mr Painter's e-mail responses on 27 August while on holiday were after the fact of the Claimant resuming full duties on 23 August, a position which on the balance of probabilities we feel Mr Painter felt the need to justify. Mr Painter's account of his 18 August meeting through his September file note post-dated the wrong door opening incident of 30 August, giving rise to the possibility that Mr Painter may have reconstructed the content of the 18 August meeting to safeguard his own position: the decision to return the Claimant to full train driving duties had been his. The unaccounted-for variations in the wordings of the two typewritten OH reports dated 27 August, the date corresponding with the management e-mail exchange involving Carl Painter, were also salient. The Tribunal found that the disciplinary and appeals officers erred in the weight they gave to Mr Painter's evidence in all the circumstances and in the conclusions they reached that the Claimant was culpable. Whether or not the Respondent was of the view that the Claimant had agreed to return to drive during a discussion with his line manager, in our judgment no reasonable employer could have concluded from the evidence that the Claimant should have been driving at the time of the wrong side door incident. Occupational Health documents advising that it may have been appropriate for the Claimant to return to driving in certain circumstances could not be interpreted by a reasonable employer as sufficient to justify the Claimant's almost immediate and non-graduated return to full duties following the discussion with Mr Painter. The Claimant had not yet visited counselling and trauma services as recommended by Occupational Health and Mr Painter did not liaise with Occupational Health professionals before making his decision.

49. The Respondent is a large organisation with significant resources including Human Resources and Occupational Health teams. The Respondent's policies, procedures and staff training suggest it takes safety very seriously. In our judgment no reasonable employer of the Respondent's size and resources would, also taking account of the safety critical nature of the services it provides, override, or consider that it was appropriate to override, its own Occupational Health department regarding a train driver's fitness to make safety critical decisions, or conclude that an employee is so at fault as to warrant dismissal when his line manger has ignored OH advice and when errors of judgment by the employee have subsequently occurred

50. We then considered contributory fault. It was the case that the Claimant

had breached the wrong side door procedure. However advice from the Respondent's own Occupational Health nurse was that that the Claimant should not be taking safety critical decisions. We noted that Mr Painter's file note stated that the Claimant had said that he was fit enough to drive. However, the Tribunal accepts that there were concerns about driving as the Claimant's fitness was being raised and questioned by other managers in Mr Painter's absence and several days after the Claimant's return to driving duties. We have considered the Claimant's conduct in light of the guidance provided in Nelson v BBC, and are not of the view that the Claimant carried out culpable or blameworthy conduct. He was in a state of anxiety. He was aware of the procedure to be followed in a wrong side door opening incident. His initial interviews suggested he was panicking and confused and this did not seem to be a situation where he was at fault. We find that the Claimant was likely to make misjudgements due to the stress of unresolved work and health issues, such stress and misjudgement being entirely foreseeable by the Respondent. His anxiety at the time of the incident was understandably heightened by the events just prior to the train journey, namely reading the Brixton Bulletin summarising the status of the investigation into his earlier SPAD incident and his platform encounter with Mr Gilbert. He was not in a position to make a sound judgment. We also considered whether, in agreeing to recommence full driving duties, the Claimant should accept some responsibility and blame for finding himself in this position, but we were convinced that the Claimant felt he had no option but to comply with the Respondent's instructions, particularly as he felt under pressure in relation to the earlier SPAD incident. His agreement to return to driving while continuing to raise concerns about doing so, as the Tribunal accepts he did, may also reflect faulty judgment on his part, but we consider this is not foolish or blameworthy given the circumstances of his health and the demands placed on him. In the light of these findings, no deduction should be made to any award in respect of contributory fault.

51. We also considered *Polkey*. We were of the view that since we had not found that the Respondent had acted procedurally unfairly it was not appropriate to make a *Polkey* reduction.

52. We considered whether an adjustment should be made for unreasonable failure to comply with of the ACAS Code of Practice. In our judgment any significant problems relating to the initial investigation had been rectified by the disciplinary hearing and the Respondent had reasonably complied with the ACAS Code of Practice and therefore no adjustments should be made under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

53. Given our judgment it may be the case that the parties can agree remedy. In the event that the parties are unable to come to an agreement a Remedy Hearing will be held.

Case Number: 2330344/2010

S Campling

Employment Judge Campling
Date: 9 August 2011

Judgment sent to the parties and entered in the Register on: : 17: 08. 11

MS M Andrews for Secretary of the Tribunals