EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondents**
Ms C Harper-Maund	Chiltern Railways Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 9 - 12 January 2017
13 January 2017 (in chambers)

EMPLOYMENT JUDGE Anstis **MEMBERS** Ms S Campbell
Mr R Moss

Representation:
Claimant: Ms M Stanley (counsel)
Respondent: Ms J Flint (solicitor)

JUDGMENT

1. The Claimant was not unfairly dismissed.

2. The Claimant was not subject to unlawful sex discrimination by the Respondent.

REASONS

A. INTRODUCTION

1. The Claimant was employed by the Respondent as a train manager from 5 August 2007 until her dismissal (without notice) on 24 February 2016. She brings claims of unfair dismissal and direct sex discrimination arising out of her dismissal and the events leading to her dismissal.

2. The tribunal heard evidence over four days from the Claimant, along with Colin Hutchison, Sandra Harper, Dal Basi and John McGarry on her behalf. The Respondent called Alan Riley and Tony Bobbin as witnesses. We were also provided with a bundle stretching to 562 pages, together with a number of additional documents produced at the start or during the course of the hearing. With the agreement of the parties, and in accordance with the previous case management order, we indicated that we would first consider questions of liability (including any reduction for contributory fault and any Polkey reduction) before then if necessary hearing evidence and argument on remedy. Having concluded the evidence and submissions by the end of 12 January 2017 we told the parties that we would reserve our decision. We then spent 13 January 2017 discussing our decision in chambers, and this is our reserved judgment and reasons.

B. THE ISSUES

3. The issues in this case are set out in the case management order of Employment Judge Warren, dated 24 August 2016, as follows:

Unfair dismissal

3.1. What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

3.2. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? The burden of proof is neutral here.

3.3. Was there a reasonable investigation?

3.4. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

3.5. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

3.6. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

Section 13: Direct discrimination on grounds of sex

3.7. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely by dismissing her?

3.8. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators – named male individuals who also used 'the fiddle' in the way that they worked.

3.9. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

3.10. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

4. For some reason, the parties had not received the case management order following the preliminary hearing. At this outset of the case, I asked the parties to check whether the case management order accurately reflected the issues in the case. In response, Ms Stanley said that the order was accurate except that:

- the Claimant was not seeking to rely on particular comparators in her sex discrimination case, and

- the Claimant's case was that her dismissal was direct sex discrimination either as a straightforward case of direct sex discrimination or by reason of her being on accommodated duties, which Ms Stanley said was so closely associated with her sex as to be a matter of direct sex discrimination in its own right.

Ms Flint agreed with this.

5. After taking instructions, Ms Stanley said that it was the Claimant's case that there was sex discrimination in the original tip-off and in the later decision to dismiss.

6. Following consideration of the case of CLFIS (UK) Limited v Reynolds [2015] EWCA Civ 439, Ms Stanley accepted in her closing submissions that if the tip-off amounted to sex discrimination but the decision to dismiss was not itself a matter of sex discrimination then the decision to dismiss did not become a matter of discrimination by virtue of it having been prompted by the original tip-off.

7. In her closing submissions, Ms Stanley accepted that the Claimant had been dismissed for missing parts of her diagram on twelve occasions (as contended for by the Respondent) but that this did not amount to misconduct because of the extent to which this (and similar matters) were permitted or tolerated by the Respondent.

C. THE FACTS

Terminology

8. This case involves a number of concepts peculiar to the railway industry. With one important exception, these were not matters in dispute between the parties, and for the sake of clarity we will set these out at the start of these reasons.

9. A train manager is primarily responsible for safe operation of the train and customer service. A secondary aspect of the role is to carry out revenue duties, including checking and selling tickets. If a train manager sells tickets, they received commission on the value of tickets sold above a certain amount. Train managers are sometimes referred to using the former terminology as "guards".

10. Train managers are based at depots. The depots we have heard about in this case are the Respondent's depots at Stourbridge Junction, Birmingham Moor St and Banbury. Train managers are usually expected to book in and collect their equipment (including "Avantix" ticket machines) from their allocated depot, which in the case of the Claimant was Moor St. They would also book out and return their equipment at their depot.

11. While driver-only operation of trains may be permitted in other parts of the Respondent's network, so far as the areas we were concerned with it was always necessary for a train to have at least one train manager in order to carry passengers.

12. Train managers are usually rostered to work according to "diagrams". The diagrams set out their duties for the day, typically by reference to the trains they are supposed to be working on on that particular day. We have been referred to a number of diagrams during the course of this hearing. The diagram that a particular train manager was working to would typically vary from day-to-day, across a 37-week roster. As will appear below, the Claimant was unusual in having fixed duties.

13. A train manager's duties as set out in the diagram were known as their "turn". There were a number of different kinds of turn:

    13.1. An "operational turn" (or simply "a turn") – this was the simplest and most common form of turn, where the train manager was the sole train manager allocated to a particular train. In those circumstances the train manager would carry out operational duties on the train, along with customer service functions and (unless there was some reason not to) revenue duties.

    13.2. A "cover turn" – one train manager per depot per shift would be allocated as "cover", being based at the depot in order to cover any unplanned absences such as sickness or assist in case of disruption to the timetable. The cover turn might also be required to help out in the station during peak periods, if not otherwise engaged.

    13.3. A general purpose (or "GPR") turn – this was a turn that would cover for planned or known absences, such as booked holidays or long-term sickness absences. Each day a few members of staff would be allocated for a general

purpose turn. If not required for operational cover, they would be sent out to carry out a "revenue turn" by their manager. We were told by Colin Hutchison that to be sent out on a revenue turn for the whole of their shift was not a popular duty, and people would often opt to take a day's holiday rather than do revenue turns for a full day.

13.4. A "revenue turn" – this was where the train manager was allocated to be the second train manager on a train that already had a train manager allocated to it. In principle, the idea was that if this happened the primary train manager on that train would take care of operational responsibilities while the secondary train manager would carry out revenue duties. Although of the same rank, the primary train manager with operational responsibility would take a senior role on the train when compared with the train manager who was undertaking the revenue turn. A revenue turn would typically only be on a diagram if there was a need to get a train manager from a depot to the start of their operational duties, or to make up time during a shift when there were no operational duties allocated and the train manager would otherwise be doing no work. This was known as "padding out" the diagrams. Rather than having a train manager carrying out no work until the end of (or at the start of) their shift they would be allocated a revenue turn as an extra train manager on a particular turn. The question of what actually happened during a revenue turn was discussed at length before us. A revenue turn was indicated by the initials "CIT" on a diagram.

As referred to above, a train manager undertaking a general purpose turn could be sent by their manager on an all-day revenue turn if there was no other work for them. This would not be formally diagrammed or rostered, but would be a decision made by the train manager's manager on the day.

The Claimant's evidence was that a train manager assigned to a revenue turn on another train manager's train would be resented by the first train manager, who would lose the chance for commission if the other train manager carried out revenue duties. On the other hand, Mr Hutchison said that carrying out revenue work was not popular, and most train managers would prefer to stick to their core operational and customer service roles. It appears most likely that whether revenue work was popular would depend on the individual train manager in question – some would welcome the opportunity to carry out revenue duties and earn commission, but others would prefer to stick to their core operational role.

14. An occasional source of confusion was that it appears that the concept of a "turn" could either apply to a train manager's whole duties for the day on a particular diagram, or to individual legs or journeys within that diagram – so at various points, a revenue turn could either refer to a whole day's worth of work (as may be the case if someone on a general purpose turn had no other operational work available to them) or an individual journey within a diagram that may take no more than 30 minutes or so.

15. The tribunal also heard a lot about the concept of a "fiddle". The essence of a fiddle appears to be that the train manager would not work the whole of their allocated diagram, but do so in a way that would not normally affect the operational running of the railway. Exactly what fiddles were or were not permitted or tolerated by management, and the circumstances in which they would be permitted or tolerated was the subject of argument before us, but it was common ground that there were at least two different types of fiddle that were tolerated by management to some degree:

15.1. If an individual was on a cover turn, and had not been called out for a particular job, then there would come a time in their shift when there would be no trains that they could go out on and still get back to their depot within their allocated shift. At that point they would often chose to leave work early, albeit

that there remained a theoretic possibility that they may be needed to help out in cases of disruption at the station.

15.2. If an individual was allocated a revenue turn for the purposes of getting them from their depot to an operational turn, there were some diagrams where there was an opportunity for them to take a later train than the one they had been allocated for their revenue turn but still arrive at their destination in good time for their operational turn. The prime example of this was diagram 218, which required the train manager to do a revenue turn on the 21:18 from Moor St. This would arrive in Banbury for 22:13, when the train manager would then have 90 minutes to wait in order to undertake their operational turn from Banbury at 23:47 arriving back at Moor St at 00:38. We were told that it was usual for the train manager to take a later train out from Moor St to then pick up the 23:47 from Banbury.

16. In his evidence Mr Hutchison agreed that there could be trouble if fiddles of this nature ended up coming to the attention of management outside the depot – as may be the case if, for instance, there was disruption late in the day but the cover train manager could not be found because he or she had gone home early. However, in practice the fiddles outlined above were tolerated by the Respondent.

17. The existence and tolerance of other fiddles was a matter of dispute between the parties. It is clear, however, that (i) some fiddles were permitted or tolerated, and (ii) there was no instruction – whether formal or informal - given by the Respondent as to what was and was not allowed. What follows in these reasons, and the fact that the parties spent four days in the employment tribunal on this dispute, amount to a cautionary tale of the risks to both employer and employee where such practices are permitted without there being clear boundaries.

History

The first grievance

18. Although the Claimant started work in 2007, the relevant history for our purposes starts in December 2011 when the Claimant requested and was given a so-called "accommodated turn". An "accommodated turn" is a fixed diagram, so that rather than working a range of different diagrams on a rota system, the individual in question works the same diagram each day on fixed hours. In the Claimant's case this was requested and granted because of her childcare commitments. We were told that at the time this arrangement was unique to the Claimant within the Respondent – no-one else had an accommodated turn. Mr Basi said that he thought that two other train managers – one man and one woman – had since been given accommodated turns. At the time, the Claimant's accommodated turn involved working a 35-hour week over five days (Monday – Friday).

19. As will become apparent, the Claimant comes from a family which is heavily involved with railways, and where a number of her immediate relatives are or were employed by the Respondent. Both her mother and father are or were employed by the Respondent, as is her uncle, and she has had the benefit of support from her family during these proceedings. Her mother (Sandra Harper) and uncle (Colin Hutchison) both gave evidence on her behalf.

20. On 8 April 2014 the Claimant raised a grievance (page 65 of the bundle). The immediate cause appeared to be a hostile reaction from some train managers to a collection the Claimant was organising for a colleague who had been injured at work, but also encompassed "comments that other colleagues are making about me and my family", and "comments written next to my name … about being on an accommodated turn, getting pregnant to avoid work, cherry picking when I have worked my rest days". Around this time, and during much of the course of the grievance investigation, the Claimant was signed sick off work.

21. Originally the Claimant's line manager, Chris Longhurst, was delegated to hear the grievance, but he was removed from the investigation following breaches of confidentiality in the investigation, and was replaced by Robert Hawkins, the Respondent's Head of Business Assurance, who upheld the grievance in the terms of a letter of 8 August 2014 which appears at page 79 of the tribunal bundle. He makes a series of recommendations, including putting Perspex covers on notice boards to prevent notices being defaced. Of those recommendations, the only one which was followed through on was reviewing the Claimant's accommodated turn.

The accommodated turn

22. As a consequence of this, a revised accommodated turn was agreed with the Claimant. This was for 35-hour working over four (rather than five) days. The Claimant was to work Monday-Thursday on a special diagram known as diagram 206. The full version is set out at page 398 of the tribunal bundle, but is summarised below:

Leg 1	10:15 Moor St > Leamington Spa, arriving 10:45
Leg 2	11:01 Leamington Spa > Snow Hill, arriving 11:37
Leg 3	12:12 Snow Hill > Banbury, arriving 13:03
Leg 4	13:21 Banbury > Stratford On Avon, arriving 14:13
Leg 5	14:35 Stratford On Avon > Banbury, arriving 15:25
Leg 6	16:43 Banbury > Snow Hill, arriving 17:39
Leg 7	17:52 Snow Hill > Moor St, arriving 17:54

Legs 1 and 2 are marked "CIT" meaning that they are revenue turns.

Leg 7 is marked "PASS" meaning it is a train not for passenger use returning to the depot.

Legs 3-6 were full operational turns.

The booking on/off times show on the diagram are 09:55 and 18:40, giving an 8:45 hour working day.

23. We were told that this was effectively the Claimant's previous accommodated turn but with the addition of the revenue turns at legs 1 and 2 which added approximately two hours to the working day and meant that the diagram would reach 35 working hours over four, rather than the previous five days. It is apparent that the revenue turns at legs 1 and 2 were introduced as a means of "padding out" the Claimant's working hours, rather than being a revenue turn for the purposes of getting her into position to carry out an operational turn. The Claimant returned to work in September 2014

The second grievance

24. In February 2015 the Claimant raised a second grievance. This concerned an RMT poster in the mess room at Leamington Spa. The poster was headed "It's not a 'man's job', it's my job". Below that, someone had added a handwritten annotation "my bloody four day a week job". The Claimant took this as being a reference to her accommodated turn.

25. Under the threat of a handwriting expert being brought in to investigate, someone (we were not given any name) came forward to admit being the culprit. The individual's explanation was that this was part of ongoing banter they were having with someone else, and not directed at the Claimant. This explanation was accepted by the Respondent, and the individual in question was given a formal reprimand in April 2015 (pages 108a-108b).

Suspension and investigation

Suspension

26. By the summer of 2015, the manager in charge of the Birmingham depot was Siobhain Thomas. Her title was "on board service manager". She was at the same managerial level as Colin Hutchison, the Claimant's uncle, who was on board service manager for the Banbury and Stourbridge depots. Both reported to Alan Riley, who was the "head of stations and on train services". John McGarry was the senior train manager based at Birmingham, and effectively served as a deputy to Siobhain Thomas and Colin Hutchison.

27. We did not hear evidence from Siobhain Thomas, but in the investigation pack at page 239 of the tribunal bundle is her account of having been approached on 13 November 2015 by an unnamed person who told her that there was gossip in the mess room about the Claimant never doing her revenue turns. It is the Respondent's position that this person was entitled to anonymity under their whistleblowing procedures.

28. In consequence of this, on 1 December 2015 Siobhain Thomas suspended the Claimant from work pending a full investigation. The Claimant was very upset by this.

29. The formal notice of suspension (page 132) gives the allegation against her as being "you have claimed for paid hours when you were not on your allocated train".

30. The Respondent engaged an external HR consultant, Peter Illes, to carry out interviews as part of the investigation. Transcripts of the interviews appear in the investigation pack at page 215 onward of the tribunal bundle.

Steps in the investigation

31. It appears that the first interview in connection with the investigation was carried out on 7 December 2015 with Siobhain Thomas. She recounted how the allegation against the Claimant had come to be made, and it appeared that she had carried out some initial investigations into the possible truth of the allegations by checking the records of what time the Claimant's "Avantix" ticket machine had been switched on each day. We were told that train managers were supposed to switch on their machines at the start of their shift, but the Claimant also told us that she did not routinely do this. Ms Thomas reported a number of occasions throughout 2015 (peaking in August, September and October) when the Claimant's ticket machine had been turned on at a time suggestion that it was done in readiness for or during the third leg of her diagram, rather than the first two, which were the revenue turns.

32. On 9 December 2015 the Claimant was interviewed by Mr Illes. She was accompanied by Geoff Cramp as her representative. She told Mr Illes that she knew of the requirement to switch on the Avantix machine at the start of her shift, but did not always do this.

33. When shown the Avantix records, the Claimant is noted as saying "in terms of the time she arrived at work – there may have been two or so occasions when she was running late". When it was suggested that the Respondent might check CCTV records, the Claimant is noted as saying she was not happy with that as her word should be enough.

34. Mr Illes interviewed Colin Hutchison the same day. He said that he had been approached by the Claimant in, he believed, late September, and the Claimant had asked to be excused from her revenue turns as she had been having problems at home and with some new medication she was taking. He said that he had told her that if she was not feeling up to it she could miss her revenue turns, provided she then completed her operational turns. He said that he had not told Siobhain Thomas about this as the Claimant wanted to keep it confidential, given the previous problems there had been with breaches of confidentiality during her grievances. He also said that immediately on hearing of the Claimant's suspension he had contacted Alan

Riley to say that he (Colin Hutchison) had agreed to her missing the revenue part of her diagram.

35. It appears that after this, the Respondent (or Mr Illes) carried out a check of CCTV footage at Solihull station, where the Claimant would typically park her car and travel to work. On 5 January 2016 there was a second investigatory meeting with the Claimant and Mr Illes. Geoff Cramp (as her representative) and Michael Thompson of the Respondent's HR department were also present. Mr Illes asked the Claimant to account for her late arrival which was shown on CCTV for three dates in July, three in August and seven days in September, up to 24 September, which appeared to be when Mr Hutchison had given the Claimant permission to miss the revenue turns. The Claimant said that she could not remember that far back, particularly given her health and the medication that she was on.

36. The outcome of the investigation was a formal investigation pack, lead by a short four page report (breaking the issues down into four allegations) and including the transcripts of the investigation interviews, stills taken from the CCTV footage, and other materials. The report is not signed. It is not clear whether it was written by Mr Illes or Mr Thompson, but we were lead to some material which seemed to suggest it had been complied by Mr Thompson. This pack was made available to Tony Bobbin, who was to hear the disciplinary case against the Claimant.

Disciplinary proceedings, and the third grievance

The allegations

37. The disciplinary allegations against the Claimant were set out in a disciplinary invitation letter as follows. These are taken from the investigation report:

- On 14 occasions [dates given] you failed to turn up for the start of your shift without authority.

- You fraudulently completed time sheets on these 14 occasions.

- You claimed for paid hours when not on your allocated train on these 14 occasions.

- Evidence collected during the disciplinary investigation indicates that you were dishonest in the investigatory meeting – you were adamant that there were only one or two occasions where you turned up late for work after the start of your shift and that we should take your word for this and not refer to CCTV to verify this.

The third grievance

38. In the meantime, the Claimant had on 22 December 2015 raised a grievance with Alan Riley. This appears at page 134, and its essence is "since my suspension there have been several reports to you directly from line managers and other staff advising you that several colleagues have not been on allocated trains and have actually left the premises but they have not been treated the same as me" (i.e. not been suspended or under investigation). The reference to reports is to reports made to Alan Riley by Colin Hutchison and John McGarry of train managers leaving work early, in respect of whom Mr Riley had apparently taken no action.

39. The grievance was heard by Andrew Poole, the Respondent's head of customer services quality, on 12 January 2016. The Claimant was accompanied by Geoff Cramp.

40. During this grievance meeting, there is discussion of "fiddles", with the Claimant saying "if there is already a train manager who is doing revenue duties on a train the other train manager who is working as a cover does not have to revenue on that train"

(the Claimant added in her notes "Actually said swapping trains to go early. If you are revenue back you could go home early rather than your booked train."). When asked if she was doing fiddles, the Claimant is recorded as saying "confirmed and added that with regards to the allegation she had a permission to do those hours" (and on her notes: "Actually said confirmed all did fiddles but on some occasions I had permission").

41. Andrew Poole did not uphold the Claimant's grievance. He set out his conclusions on the grievance in a letter dated 19 January 2015 at pages 185 to 188 of the tribunal bundle, concluding:

> "This grievance is understood to be centred upon the application of 'the fiddle' and that you are not being permitted to work within the same practice as others. This is not the case here as you are already working on an accommodation (flexible working arrangement) and the charges related to not being at work for the start of duties. This is fundamentally different to not being in post after managers apply discretion to allow staff to finishing early where they have no more on-train duties."

42. The Claimant appealed against Mr Poole's decision on 22 January 2016, in a letter which is at page 192 of the tribunal bundle. This primarily focussed on the process used by Mr Poole to investigate her grievance, rather than the underlying merits of the grievance.

The disciplinary hearings

43. Tony Bobbin, the Respondent's head of fleet planning, held a disciplinary hearing with the Claimant on 28 January 2016. Also present were Michael Thompson, of HR, and Geoff Cramp as the Claimant's representative.

44. On 25 January the Claimant's GP had written to the Respondent's occupational health advisor saying that she was unfit to work or to "attend disciplinary procedure". On 25 January the Respondent's occupational health advisor saw the Claimant and her husband (in circumstances which we were told later lead to a complaint being made by the Claimant to the occupational health service) and on 26 January he reported that the Claimant "is fit to attend a disciplinary hearing". Neither doctor give any reasoning to back up their different conclusions. The Claimant was sent a letter by Michael Thompson saying that the hearing would go ahead in her absence if she did not attend. Mr Bobbin knew nothing of these letters, although he was told by the Claimant during the first disciplinary hearing that she had been advised by her doctor not to attend the hearing. Mr Bobbin also knew nothing of the grievance that had been raised by the Claimant.

45. The conduct and content of the disciplinary hearings was in dispute between the parties. In the course of our deliberations we have taken particular care to review the notes of the disciplinary hearings.

46. It was the Claimant's case that she had not been able properly to express herself in those disciplinary hearings due to her illness and to Mr Bobbin's difficult and intimidating attitude.

47. The notes we have read do not suggest to us that Mr Bobbin was difficult or intimidating in those meetings. On the contrary, he appears to have taken care to ensure that the Claimant was able to put forward her version of events. We heard oral evidence from Mr Bobbin on the approach he took to the hearing. We considered Mr Bobbin to be an impressive and honest witness, who was willing to accept points put to him by Ms Stanley which might not necessarily have been considered to be in the Respondent's interests. For instance, he accepted that he was unaware of the full medical information about the Claimant's state of health, that he was unaware of the grievance and that, had the Claimant told him what she now says to the tribunal, his decision on dismissal may well have been different (he said it would be "very difficult

for him to dismiss" in those circumstances). More than that, it is apparent from the notes of the disciplinary hearings that he wanted to take a fair-minded approach to the disciplinary hearings – notably immediately accepting at face value what the Claimant told him about "fiddles". He also held the disciplinary hearing in two parts to enable the Claimant to call some witnesses.

48. At the tribunal hearing, the Claimant accepted that the Respondent's account of her missing the first two legs of her diagram on twelve occasions was more-or-less correct (although she could not recollect the exact dates) but that this was simply a "fiddle" in the same way as the other fiddles that had been described to us. Her case was that entirely missing revenue turns (and not making them up on later or earlier trains) was normal practice and considered within the depot to be a permissible "fiddle". Sandra Harper, the Claimant's mother, who had herself held a senior position within the Respondent, went so far as to say that she would have been more surprised to learn that the Claimant was actually doing the revenue turns than she would have been to learn that she was not doing them.

49. It is apparent from the notes of the disciplinary hearing that this is not the way the Claimant put things at the time.

50. The first disciplinary hearing was held on 28 January 2016. There was initially some discussion of the CCTV extracts, with the Claimant calling another employee who identified herself (that is, the other employee) as being the person on one of the CCTV extracts. This was immediately accepted as being correct by Mr Bobbin.

51. After some further discussion of the legal position concerning use of CCTV, the Claimant goes on to describe a "fiddle" by reference to the 218 diagram referred to above. When asked by Mr Bobbin if, in the case of the 218 diagram "they were still doing their revenue turn, but on a different train", the Claimant is recorded as saying "that was the case and that you might just sit down on the train as there is a train manager or do a half and half". When Mr Bobbin asks the Claimant to give an example of a fiddle at the end of a shift, she says that if you were on a revenue turn at the end of your diagram you might be able to do that on an earlier train, and also refers to a revenue guard getting off a train early in their route to go home. Geoff Cramp asks the Claimant whether there are any other fiddles, and she refers to a cover turn leaving early in the manner described above. There is a reference to the Claimant calling more witnesses, including one in respect of the 218 diagram. Mr Bobbin is recorded as saying "unless they were going to tell him anything different then he believed what [the Claimant] had said about the fiddle on that turn". There is discussion of possible further witnesses, and Mr Bobbin is recorded as saying "he is not investigating if people swap as guards on train and he is not looking if [the Claimant] is doing her train manager role but her revenue turn."

52. Mr Bobbin goes on to ask the Claimant what she considers the boundaries of fiddles to be. She is recorded as saying "she did not really have an answer for that as it's all down to the individual and [or, or] seeking permission".

53. The discussion then turns to the detail of the Claimant's particular diagram. Mr Bobbin asks the Claimant "within this specific diagram, is there any scope for fiddles that have been mentioned earlier". She replies "not really but sometimes the cover would take the turn through the tunnel", and goes on to explain that sometimes if the cover train manager at Moor St is available, she can get off at Moor St which is the penultimate stop on leg 6 of her diagram, with the cover train manager than taking the train through the tunnel to Snow Hill and coming back again (leg 7). The effect of this would be to cut the final 20 minutes or so off the end of her working day. When asked whether this regularly happened, the Claimant said that it depended on who the cover was and whether they were available.

54. Mr Bobbin then goes on to ask the Claimant if she is saying that there is no scope for fiddles on her diagram other than leaving early at Moor St. The Claimant replies by talking about times when she might have had to stay late at work. Mr Bobbin goes on

to say "the allegation is about the revenue part of the day and … that [the Claimant] has not been turning up for the revenue part of her diagram".

55. Mr Bobbin goes on to ask the Claimant "if it was a fiddle for someone not to do the revenue part of their turn". The Claimant agrees with that. When asked if it would be acceptable for someone on a revenue turn simply not to turn up for it, she replies by reference to the 218 diagram.

56. Mr Bobbin goes on to ask the Claimant "to try if she could remember anything where she did not turn up for that part of her diagram because it was a fiddle and if she had never done it, frequently or infrequently". The Claimant replies that if there were delays on the line she might ask her manager whether she should do the revenue part of her diagram. Mr Bobbin says that that sounded sensible, and asked the Claimant if there were any times when she had not turned up for work until the start of her operational turn at 12:12. She replies "she did not recall at anytime doing that". When pressed, she says that she may have done if there was an issue with her children's school, but that she "would seek to get permission if possible". The following exchange is then noted:

> "TB Sorry to labour the point but could CH clarify that she would never miss the revenue part of her diagram without seeking permission for either a personal reasons or for a work related one such as disruption of the line.
>
> CH Said that is correct as there is no point in dropping her children at school and then going home for an hour it would be a waste of time."

57. The conversation then moves on to discussion of timesheets, and the Claimant identifies one of the dates as being when she had a doctor's appointment. There is further discussion about missing the start of her shift, and the Claimant says she would always aim to seek permission for this, and when pressed by Mr Bobbin said that it was possible that there could have been days when she missed the start of her shift without getting permission. Mr Bobbin says that this is an important point, and the Claimant says it is hard to say whether permission was given so long ago "if there were appointments" (which we take to mean medical appointments). When finally asked whether there have been times that she has not turned up for work without having permission, the Claimant is recorded as saying "she has no idea".

58. There is then further discussion concerning the use of CCTV, and the Claimant asks to call further witnesses. Mr Bobbin agrees to adjourn the meeting, which is recorded as having taken from 10:00 to 14:25, with several breaks.

59. The disciplinary hearing resumed on 10 February 2016. Shortly after the opening of the meeting there is a passage of discussion between Mr Bobbin and Geoff Cramp about fiddles in which the following exchange is recorded:

> "TB Said that CH had said that she did not fiddle her diagrams.
>
> GC Said that is correct."

60. John McGarry is called to give evidence for the Claimant. He talks of fiddles being "overlooked", and refers to the 218 diagram as involving a fiddle. There is discussion about the arrangements for completing timesheets. Talk then turns to people missing revenue turns, as follows:

> "TB Asked what would happen if someone wanted to miss their revenue turn and did not tell him, how would he feel.
>
> JM Said that he would ask a question and say to them did they do their turn and if she said not then he would ask them if there were any

reasons why they had not. The first time would have a quiet word with them.

TB Said that was because he thought it was the wrong thing to do.

JM Said that it depends on the reason why they did not do it as if the reason was due to a disruption.

TB Asked what would happen if the reason was they just did not feel like it.

JM Said that did not really happen and therefore could not answer it. The relationship that he has is that they will ask him …"

In his oral evidence to us, when taken to this exchange Mr McGarry said that what he is recorded as saying "did not really happen" was in fact common practice, and he must have got confused during the disciplinary hearing. We do not accept that. The line of questioning is clear, and in any event the notes of the meeting were thoroughly reviewed by the Claimant without any corrections being made to this section. We consider what is recorded to be an accurate record of Mr McGarry's views at the time.

61. Further evidence is heard, and Mr Bobbin then asks if the Claimant wants more time to consider whether she has anything more to put forward. There is a break of 30 minutes, and further discussions. Mr Bobbin gives the Claimant a further opportunity to consider matters, before the Claimant says that she wanted to plead guilty to all of the charges on behalf of all train managers, and then, when asked by Mr Bobbin whether she denied all the allegations, is recorded as saying she could neither confirm or deny.

62. We have set out extracts from the disciplinary hearing at length in these reasons. It is clear to us that what the Claimant says now about her missing her revenue shifts being an acceptable "fiddle" was not what she told Mr Bobbin during the disciplinary hearings. While there was general discussion of fiddles, her direct response to the allegations were that she either did not miss any revenue shifts or could not remember having missed any revenue shifts, beyond the one that she had a doctor's appointment on. Both her and Mr McGarry were clear that the norm would be that if you had a good reason you could miss a revenue turn with your manager's permission, but of course the Claimant did not ask permission until late in September.

63. Ms Stanley was able to point us to some of the extracts cited above as suggesting some ambiguity about whether the Claimant was referring to missing a revenue turn as being a fiddle, but what strikes us is that Mr Bobbin gave the Claimant and her representative multiple different opportunities to say what she now says, and in every case where she or her representative are clear it is that she did not miss revenue turns and that she is not relying on missing a revenue turn as being a fiddle.

64. Mr Bobbin prepared a comprehensive outcome letter, dated 24 February 2016 and at page 327 – 329 of the tribunal bundle. He upheld the first, third and fourth allegation, but not the second (fraudulently completing time sheets). This letter discusses "fiddles" in relation to the Claimant leaving her train early at Moor St, but records that "both yourself and Geoff Cramp confirmed in the hearing that failure to complete the revenue part of the diagram was not a fiddle and that you would only miss it with authorisation". The letter notifies the Claimant that she is dismissed with immediate effect on 24 February 2016.

Appeals

65. The Claimant appealed against the decision to dismiss her, and had previously appealed against the decision on her third grievance. The appeal on her grievance was heard first. After apparently being rescheduled a number of times it was heard on 11 March 2016 by Brett Chalkley, the Respondent's interim engineering director.

66. As previously stated, the Claimant's grievance appeal was largely on the basis of the procedure adopted by Mr Poole in the original grievance hearing, rather than the underlying issues. We have considered the notes of this appeal hearing and the later further appeal hearing held on 12 May 2016, but neither seem to add materially to the Claimant's or Respondent's cases on the underlying issues in this case. In any event, both post-dated the Claimant's dismissal.

67. The Claimant's appeal against her dismissal was heard by Duncan Rimmer, the Respondent's finance director. The notes of the meeting are at pages 355-374 of the tribunal bundle. Also in attendance were the Claimant, John McGarry (as her representative) and Michael Thompson.

68. Mr McGarry first takes objection to Michael Thompson attending the meeting, pointing out that he had previously been involved in the investigation and attended the original disciplinary hearing. Mr Rimmer replies that Mr Thompson is there to take notes, and that there is no one else available from HR. The Claimant then took Mr Rimmer through the history of her previous grievances, and criticised her suspension from work during the investigation and the length of time she had been suspended for.

69. After some procedural arguments, the meeting moved on with Mr McGarry referring to a number of diagrams where he said people he worked less than their rostered hours, yet had not been investigated. The Claimant put forward arguments about whether the CCTV footage could properly be relied upon, the reliability of any information about when the ticket machine had been switched on, whether the whistleblowing policy applied in respect of the allegations that had been made against her and whether Mr Bobbin had allowed or should have allowed her to call witnesses.

70. There was further discussion about whether Mr Cramp should have been allowed time off work to prepare to assist the Claimant in her disciplinary hearing. An email that Mr Cramp had sent raising a number of procedural points was discussed. Mr McGarry went on to say that "no one has been involved in this who understands fiddles" and that someone from the operational or driving team should have been involved in or called at the disciplinary hearing. The Claimant went on to say that given her health issues she struggles to remember things, reading an extract from a letter from her doctor to that effect.

71. The Claimant goes on to question whether Mr Bobbin had proof that she had never turned up on time, and said that his evidence had been based on CCTV footage that had not been checked and a ticket machine that was not switched on at the start of the shift. After further discussion, Mr Rimmer asks the Claimant whether she is saying that she had permission to miss her revenue turns, and she is recorded as saying "yes and for the other reasons she did not have arrive on time she would have had a valid reason". There was then discussion about what did and did not amount to gross misconduct under the Respondent's disciplinary procedure. The Claimant said that she was being bullied as a result of her accommodated turn, and that the "whistleblowing" was an act of revenge by someone. She said that the sanction of dismissal was too severe, and inconsistent with what had been applied to other employees, as "time sheets have been completed for times where people are not at work and no action has been taken against them", and that if people were late to work there was simply a form to be completed for that – this was an issue that should have been dealt with as a matter of poor performance.

72. The appeal hearing then proceeded to discussion of some final points from the Claimant. The meeting is recorded as having lasted from 13:30 to 16:40, with breaks.

73. The appeal outcome letter is at page 349 – 353. Mr Rimmer upheld the Claimant's appeal against the fourth allegation (that she had lied in the investigation meeting) as "there is insufficient evidence to prove you were lying to the investigation manager, given your documented medical condition" but "that does not impact the outcome of

this appeal". In all other respects Mr Bobbin's decision (including the decision to dismiss without notice) remained undisturbed by the appeal.

Further events

74. On 16 May 2016 Mr Riley sent an email to all train managers. This starts "to ensure we are clear on the responsibilities for communicating any changes to the planned operation, please see … below" – there is then a table setting out, essentially, that deviations from allocated diagrams by train managers are not permitted without notification to and authority from the Respondent's control centre in Banbury.

D. RELEVANT LAW AND SUBMISSIONS

75. There were no substantial disputes of law between the parties. We have taken into account the entirety of their submissions, but will summarise them briefly below. We take our basic legal structure to be as set out in the list of issues in the case management order, referred to at the start of these reasons.

Submissions for the Respondent

76. For the Respondent, Ms Flint took us through some of the basic principles of law applicable to unfair dismissal cases where the reason for dismissal is said to be misconduct, by reference to the requirements of British Home Stores Ltd v Burchell [1978] IRLR 379 and the range of reasonable responses as described in Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23, while reminding us that we must avoid the "substitution mindset" (London Ambulance Service NHS Trust v. Small [2009] EWCA Civ 220), with our focus being on the actions of the employer, rather than our own view of the facts. Mr Bobbin had found that the Claimant had flouted her contractual obligations (para 2.1 of her terms and conditions of employment (at p1 of the tribunal bundle) says "you are required to attend work, at the correct place and for your full turn, regularly and punctually") by simply not turning up for the first two legs of her diagram. She had not admitted to this when challenged with it. She had not offered the excuse that this was a "fiddle", and by saying that she had asked Colin Hutchison for permission (for part of the period only) had effectively admitted that it was not generally permitted for her to miss this part of her turn. The Claimant had said very clearly that she would not miss her revenue turn without permission. There was a distinction between her case and that of those who took a later or earlier train – they were still doing their duties, albeit on a different train. It was not necessary for the Respondent to investigate every point put forward by the Claimant (Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94). If the dismissal was unfair, then it was one that the Claimant had contributed to by her conduct, and this should be reflected in any award of compensation, and a Polkey deduction should be made if any defect in procedure was found.

77. In respect of the discrimination claim, Ms Flint said it was for the Claimant to show prima facie grounds from which discrimination could be inferred. There were no such grounds here. The disciplinary officer was not influenced by anyone else, and the Claimant's accommodated duties were not any part of his decision. There was nothing to suggest that the Respondent had any difficulty with the Claimant's accommodated turn.

Submissions for the Claimant

78. While accepting that the Claimant had been dismissed for not doing the revenue proportion of her diagram on twelve occasions, Ms Stanley said that in doing so the Respondent did not have a genuine belief that that was misconduct (i.e. that it was outside the normal bounds of what would be permitted or tolerated) and that there were no reasonable grounds for such a belief and that there had not been a reasonable investigation. She also said that there were four relevant procedural flaws.

79. While accepting that we should not fall into the "substitution mindset", Ms Stanley said that we would need to make findings of fact about the extent of "fiddling" in order to consider whether Mr Bobbin had carried out sufficient investigation. Ms Stanley said that Mr Bobbin had not made any enquiries into the extent of permitted fiddles. Ms Stanley referred us to para 180 of the disciplinary hearing notes (referred to at para 55 above) as being the point at which the Claimant raised the question of fiddling in the context of her situation. She said that following this Mr Bobbin should have undertaken further investigation with someone on the operational side of the business.

80. Looking at the appeal decision, Ms Stanley referred to extracts at para 39, 41 and 112-3 as being references to relevant fiddles.

81. Also on the question of a reasonable investigation, Ms Stanley referred to Mr Bobbin not being aware of the grievance that the Claimant had made, and said that the appeal officer had also not taken this grievance into account.

82. As regards whether the decision was within the range of reasonable responses, Ms Stanley said that what the Claimant had done was common practice, and this was admitted to be acceptable by the Respondent, at least in particular circumstances. The Claimant was being treated differently from her colleagues. This was relevant both to the question of whether it was misconduct in the first place and also to the question of whether the sanction of dismissal was appropriate. Ms Stanley said that it was evident from, for instance, the different grievance appeals, that different managers applied different standards in respect of permitted fiddles.

83. As regards procedural fairness, Ms Stanley made four points:

- the allegations were not clear,
- the disciplinary hearing proceeded when the Claimant was unfit to attend,
- Michael Thompson of HR had participated in the investigation, disciplinary and appeal hearings, and
- Mr Bobbin not allowed the Claimant to call witnesses at the disciplinary hearing.

84. Ms Stanley went on to say that the role of the whistleblower was relevant to both procedural fairness and the sanction. The Respondent had allowed consideration of an anonymous witness without considering whether this was appropriate or what their motivation might be.

85. On the question of sex discrimination, Ms Stanley said that she had put the Claimant's history of less favourable treatment to Mr Bobbin. As the Claimant was dismissed for what was normal practice, the dismissal could only be because of sex discrimination and the burden of proof was thereby reversed. She had been unfavourably treated because of her accommodated duties, which she said amounted to direct sex discrimination – Ms Stanley said that to the Respondent's mind these were two sides of the same coin, as suggested by her earlier grievances. Ms Stanley says that the Claimant was at the time the only person who had accommodated duties, and this was sufficiently connected with her sex to make it a matter of direct sex discrimination.

E. DISCUSSION AND CONCLUSIONS

Unfair dismissal

86. Considering the question of unfair dismissal generally, the difficulty that the Claimant has in this case was clearly identified by Mr Bobbin in his evidence.

87. The CCTV footage uncovered during the investigation (which the Claimant largely failed to engage with over a number of different hearings) appeared to show that on a substantial number of occasions the Claimant had completely failed to carry out her

revenue turns, thereby missing approximately the first two hours of her shift. On the face of it, without there being some explanation or excuse for this, an employer would be well entitled to treat this as gross misconduct justifying dismissal.

88. The problem for the Claimant is that she did not during the disciplinary procedure put forward the explanation that she has now given to the tribunal – that what she was doing was an acceptable fiddle.

89. We have set out above our analysis of what was said during the disciplinary hearings. There was plainly discussion of fiddles, and at some stages hints that this might be relevant to the Claimant's case, but when the point arose directly the Claimant (or her representative) denied that what she was doing was a fiddle.

90. It is evident that in making his decision Mr Bobbin did not understand the Claimant to be saying that she was engaged in a permissible fiddle. That was his oral evidence to the tribunal (and we have already said that we considered him to be an impressive and honest witness) but was also set out at the time in the dismissal letter.

91. Without the excuse that this was a fiddle, there is no doubt in our mind that Mr Bobbin was entitled to (and did) consider the Claimant's absences from her revenue turns to be misconduct justifying dismissal.

92. The only point that can be said against that is that despite the Claimant (or her representative) saying that there was no fiddle, Mr Bobbin was bound (in order to complete a reasonable investigation) to make further enquiries. This brings into consideration a number of the points made by Ms Stanley, including questions of procedure.

93. First, there is the question of the formulation of the allegations. Each of the allegations as set out in the disciplinary letter relates in some way to starting late, but still claiming full pay. That was admitted by the Respondent to be permissible in some circumstances – notably on the 218 diagram. Anyone carrying out the usual fiddle on the 218 diagram could properly be accused of allegations 1-3 (and maybe allegation 4, if they initially denied it).

94. The primary purpose of any disciplinary allegation is that the employee concerned should know what it is that they have to address. The tribunal is not concerned with formulation of a charge sheet in a strict legal sense. We consider that the allegations could have been drafted better to more accurately reflect the specific misconduct that the Claimant was accused of, but it is apparent from the extracts cited above that the Claimant was asked multiple times by Mr Bobbin about the precise relevant misconduct – missing her two revenue turns. The Claimant had a full opportunity to address the point in issue, and that is what goes to the fairness of the dismissal, even if the allegations could have been framed better.

95. Second, there is the question of whether the disciplinary hearing should have gone ahead at all, given that the Claimant had told Mr Bobbin that she had been advised by her doctor not to attend.

96. The medical evidence on this is mixed, with one doctor saying she was fit to attend the hearing, and another saying she was not, with neither giving any reasons. What we are concerned with, and what is at the heart of fairness, was whether the Claimant was in a position during the disciplinary hearing to properly put forward (if necessary with the assistance of her representative) every relevant point that she wanted to.

97. Having read the notes of the disciplinary hearings, we were impressed with the thoroughness of Mr Bobbin's approach and the lengths he went to in order to give the Claimant an opportunity to put forward her case. It is not evident to us on a consideration of the minutes of the meeting that the Claimant was at a disadvantage in the meeting or was unable to put forward her point of view. Indeed, it is evident that

both she and her representative spent some considerable time in both meetings putting forward her case and her point of view.

98. There is then the question of whether Mr Bobbin ought to have allowed the Claimant to call further witnesses. It is notable that Mr Bobbin did allow the Claimant to call in total four or five witnesses, adjourning the hearing in order for her to be able to do so. Insofar as these additional witnesses may have shed light on "fiddles" it is evident from the notes of the meeting that Mr Bobbin substantially accepted what he was told by the Claimant about fiddles. We do not see that additional witnesses would have assisted when Mr Bobbin was accepting what he was told by the Claimant about fiddles.

99. It is convenient at this point to deal also with the involvement of Mr Thompson. We take account (as we are bound to) of the provision in the ACAS Code of Practice that "in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing." However, we accept what Mr Bobbin said – that Mr Thompson did not participate in the making of his decision to dismiss. Mr Bobbin struck us as being independent-minded and thorough in his approach, and we do not consider that Mr Thompson's involvement had a material effect on his decision or made the decision to dismiss unfair.

100. As for the question of the grievance, we are surprised first that the Claimant raised the matters concerned in the grievance as a separate grievance, rather than within the context of the disciplinary procedure, and second that having heard the grievance the Respondent did not inform Mr Bobbin of the grievance and the outcome. However, having considered the grievance notes, what continues to be missing is a clear statement by the Claimant that what she was alleged to have done amounted to a fiddle. At most in the grievance meeting she refers to missing revenue turns with permission, which she did not have for the revenue turns which were cited in the allegations against her. She was also given ample opportunity to put forward any relevant matters that she wished to in the disciplinary hearings.

101. This leaves us with the question of whether, in order to undertake a reasonable investigation, Mr Bobbin ought of his own initiative to have taken further steps which may have uncovered what the Claimant now says – that her failure to carry out her duties was a permissible fiddle. That has to be considered in all the circumstances of the case, including the question of the Claimant's health at the disciplinary hearings and the separate grievance proceedings.

102. We do not consider that, in the light of the denials from the Claimant and her representative, Mr Bobbin was obliged to look further and see if the failure to attend work ought to have been a fiddle. There may be some cases in which a manager is obliged to investigate something even if not specifically raised by the employee, but this is not such a case. There was no obligation on Mr Bobbin to investigate further whether this was a fiddle when both the Claimant and her representative accepted on being asked that it was not a fiddle.

103. There remains the question of the appeal (including the grievance appeals) and whether they affected the fairness of the dismissal. By the time of the appeal the Claimant had a clear statement from Mr Bobbin in the dismissal letter that she had not raised her absences from work as being a fiddle. With that in mind it ought to have been a straightforward matter for her or her representative to directly address the point and say that Mr Bobbin was wrong during the appeal hearing. However, it is clear to us that this was not done, and we do not consider that the appeal hearings affect the fairness of this dismissal one way or the other.

104. Finally, Ms Stanley said that the Respondent should have considered the motivation of the anonymous whistleblower. Plainly it is the case that employers have to be cautious of allegations made under cover of anonymity, but it seems to us that that in this case the Respondent was cautious. No reliance was placed in the disciplinary proceedings on the rumours in the mess room. All the whistleblower had done had

been to prompt investigation which then lead the Respondent to verify the Claimant's attendance from other sources such as the Avantix machines and CCTV. No direct weight was placed on the whistleblower's account. We deal with the question of whether the whilstleblowing was an act of sex discrimination separately below.

Sex discrimination

105. It was the Claimant's case that the reporting of her for carrying out common practice in itself gave rise to an inference of sex discrimination – that is, if everyone else was doing it but only she was reported, that in itself amounted to a prima facie case of sex discrimination (either on the basis of her sex or on the basis of her accommodated turn, which was itself an aspect of her sex) so as to put the burden of showing an innocent explanation on the Respondent.

106. While taking into account the evidence of the Claimant's witnesses, we are unable to accept that what she did – that is, completely missing her first two revenue turns without permission or a good reason - was common practice, so as to give rise to an inference of sex discrimination. This is because:

a. When the Claimant's accommodated turn moved from five to four days, this was done by adding on approximately two hours of revenue turns at the start of the day. If it was common practice to miss revenue turns then the change to her accommodated turn would have been known by operational staff to simply amount to her receiving full pay for doing the same work as before (her operational turns) on four rather than five days. That seems unlikely.

b. If it had been common practice to completely miss revenue turns then it is not clear why the Claimant did her revenue turns at all. It is apparent that she did the revenue turns far more often than she did not, when there would, on her case, have been no need for her to do it.

c. If it had been common practice to miss revenue turns then there is no explanation for why the Claimant later found it appropriate to seek permission from Colin Hutchison to miss the revenue turns when by missing her revenue turns she would only have been operating to the common practice carried out by her colleagues.

d. It was John McGarry's evidence at the time of the disciplinary hearing that missing a revenue turn without good reason and/or permission "never happened".

107. We find that that does not give rise to an inference of sex discrimination.

108. It is evident from the earlier grievances that there was, at least at one time, some resentment of the Claimant's accommodated turn from some of her colleagues. We are familiar with arguments that accommodated working arrangements or part-time/flexible working can involve concepts of indirect sex discrimination, but it was Ms Stanley's contention that in the Claimant's case the accommodated turn was so closely connected with her sex as to be itself a matter of direct sex discrimination. We do not accept that. There is no basis under sections 4 or 13 of the Equality Act 2010 to consider an accommodated duty to be an aspect of the protected characteristic of sex.

109. In any event, even if matters in relation to the accommodated turn could be said to be direct sex discrimination, we do not see that the Claimant has shown facts from which we could conclude that the difference in treatment was due to sex (or the accommodated turn). While acknowledging that there has, in the past, been some resentment of the accommodated turn, we do not see anything to suggest that the whistleblower's report was motivated by such resentment. As we have found above, there are a number of reasons to show that what the Claimant was doing was not common practice, and therefore liable to be reported.

110. Ms Stanley referred in her argument to some wording in relation to the accommodated turn that appears in the grievance outcome letters. That wording is somewhat difficult to understand, but it appears to us to relate to the fact that the Claimant's accommodated turn was unusual in having two revenue turns (going out and back to the same location) at its start, and that this meant that it was only her who had the possibility (found to be misconduct) of missing the first two turns of her diagram. That is not a matter of sex discrimination.

111. For the avoidance of doubt, we do not see any sex discrimination in either the original whistleblowing or in the decision to dismiss.

Summary

112. We now return to the list of issues at the start of these reasons, giving our answers to the questions posed:

112.1. What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

> *The reason for dismissal was misconduct, and the Respondent had a genuine belief in the misconduct.*

112.2. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? The burden of proof is neutral here.

> *The Respondent held that belief on reasonable grounds.*

112.3. Was there a reasonable investigation?

> *There was a reasonable investigation.*

112.4. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

> *The decision was a fair sanction, within the range of reasonable responses open to a reasonable employer.*

[The remaining issues on unfair dismissal do not apply.]

112.5. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely by dismissing her?

> *The Respondent did dismiss the Claimant.*

112.6. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators – named male individuals who also used 'the fiddle' in the way that they worked.

> *This point regarding comparators was not pursued by the Claimant.*

112.7. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

> *The Claimant has not proved primary facts from with the tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's sex.*

[The remaining issue does not apply.]

Conclusions

113. The Claimant was not unfairly dismissed, and was not subject to unlawful sex discrimination by the Respondent.

Employment Judge Anstis
23 January 2017

Date Sent: 25 January 2017