



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A R Trice  
**Respondents:** London & South Eastern Railway Limited

**Heard at:** Ashford **On:** 24-26 September 2019

**Before:** EMPLOYMENT JUDGE CORRIGAN  
Mrs J Jerram  
Mr P Adkins

## **Representation**

**Claimant:** Ms S Sleeman, Solicitor  
**Respondent:** Mr C Parkin, Counsel

## **REASONS**

*Judgment dated 27 September 2019, sent to the parties on 6 November 2019  
Written reasons requested at the hearing and in writing by the Respondent on 8  
November 2019*

## **Claims and issues**

1. By his claim dated 14 October 2018 the Claimant claims unfair dismissal, wrongful dismissal and discrimination arising from dismissal.
2. The issues were agreed between the parties to be:

## **Discrimination arising from disability**

3. The Respondent accepts that the Claimant was disabled at the relevant time. The disability is the Claimant's ankle condition.
4. Do the Claimant's actions on 12 January 2018 in issuing a ticket to a customer amount to "something arising from" his disability? The Claimant claims this was something arising from his disability because he only had access to the ticket office because he was on restricted duties because of his disability.
5. Was the Claimant's inability to undertake the full range of contractual duties of his post something arising from his disability?

6. If so was the Claimant treated unfavourably because of something arising from his disability? The unfavourable treatment relied on was the Claimant's dismissal.
7. Was the dismissal a proportionate means of achieving a legitimate aim? Did the respondent have the requisite knowledge?

**Unfair dismissal**

8. What was the reason for dismissal? Was it the potentially fair reason of conduct? Was the decision reasonable? Did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation? Was it within the range of reasonable responses to dismiss?
9. Is there a chance the Claimant would have been dismissed fairly in any event?
10. Did the Claimant contribute to the dismissal?

**Wrongful dismissal**

11. Did the Claimant commit conduct which justified withholding notice?

**Hearing**

12. We heard evidence from the Claimant and Mr John Hulott, Union representative, on behalf of the Claimant. We heard evidence from Ms M Northfield (Area Manager) and Mr Gerry Kirk (General Manager) on behalf of the Respondent.
13. There was a 303 page bundle of documents.
14. Both representatives produced written submissions and both made oral submissions. Based on the evidence before us we found the following facts.

**Facts**

15. The Claimant began working for the Respondent on 1 August 2012 as a member of station staff. The Respondent has high customer service goals and expectations of staff – including “going the extra mile”.
16. The Claimant worked on the gates at Ashford station. The Claimant was trained and qualified to use the Advantix machine in June 2013. In 2016 C at tended training on STAR ticket system but did not pass. The Claimant was not qualified to sell tickets using the STAR ticket system.
17. The Claimant had been through the medical capability process in 2016 which culminated in his resuming his gateline duties. He then fractured his ankle in

June 2017 and was initially signed off sick and was then advised to undertake restricted duties upon his return in October 2017. He was again being managed under the medical capability procedure. He was given a 12 week period to find an alternative position from 21 November 2017. That was due to end 13 February 2018. He was placed on restricted duties from the first week of December 2017 while he found a permanent alternative role (p193). He was placed as a Linesman at a different station, undertaking duties such as cleaning and passenger assistance.

18. Whilst on temporary light duties on 12 January 2018 the Claimant's colleague reported the incident for which the Claimant was dismissed (p211). The colleague was working in the ticket office and reported that he had gone to shop opposite for a drink and returned to find the Claimant had issued a ticket. It is accepted now by the Respondent that the Claimant was authorised to be in the ticket office for his role and that he had been emptying bins and photocopying.
19. The Claimant's colleague attended a fact finding meeting on 15 January 2018. He was not suspended. The Claimant's fact finding meeting was on 1 February 2018. From the outset the Claimant said he "did not think" and had wanted to help the customer when the customer asked for a ticket. He accepted that he should not have done this and that he had done wrong. When asked if he would sell a ticket again he said "no". He was asked if he was sure. He said, "no, not after all this now. On that day I didn't think". He later said "I wanted to make the customer happy, it was a one off and I didn't think".
20. The Claimant was then suspended. The reason why the Claimant was suspended at this stage has not been provided.
21. The Claimant was invited to a formal disciplinary hearing on 16 March 2018, by letter dated 2 March 2018. The charge was:

"Gross misconduct in that on the 12<sup>th</sup> January 2018, you entered the ticket office without permission..., knowing the clerk on duty was not present, then issued a ticket to a customer from a star machine logged on as [your colleague] of which you have no authority to do.

This is contrary to sections 8.2, 8.3, 8.6, 18.1, 18.18 of the Company's Code of Conduct. It also breaks the trust that must exist between an employer and employee".

8.2-8.6 are under the heading general rules and are found on page 67 of the bundle. 8.2 provides that an employee should only handle cash or carry out a financial transaction if authorised and trained to do so. 8.3 provides that if an employee is allocated a delegated level of authority this will be confirmed in writing and must not be exceeded. 8.6 is the requirement to observe accounting and other instructions when dealing with money and tickets.

22. Paragraph 18 relates to personal conduct. 18.1 states that employees should always behave with a high standard of integrity and 18.18 states that the

- employee must not act in a manner which equates to a dereliction of duty (page 69).
23. The Code of Conduct also lists examples of gross misconduct at paragraph 19, page 70. These include deliberate or negligent contravention of Company rules.
  24. Whilst the Claimant was going through this process he was also continuing to be managed under the capability process due to his ankle injury. A final medical capability meeting was scheduled for 12 March 2018. This was 4 weeks after the initial 12 week period redeployment was due to end, but 16 weeks is given for those on light duties. This was dealt with by Mr Wells (Station Manager at Ashford). That meeting is recorded at pages 259-260. The Claimant had applied for a Welcome Post at Victoria. He was effectively given an extension to find an alternative role as the meeting was adjourned to 28 March 2018 for the Claimant to attend the medical centre for a review. In the event the meeting on 28 March did not take place as the Claimant had been dismissed on 16 March 2018.
  25. The disciplinary meeting on 16 March 2018 was conducted by Ms Northfield. By that meeting the Claimant accepted he had been on ticket training and was aware of the regulations. He said he had found the theory hard because of a possible learning disability. He demonstrated that he would do differently next time. His representative apologized on his behalf. The Claimant said he was very sorry and had always done what he can to give customer service. There were some additional allegations from the ticket office colleague that were not explored with the Claimant and are not relied upon, and changed over time.
  26. Ms Northfield made her decision after an adjournment and it is set out at pages 268-270. It was accepted that the Claimant's actions were not deliberate and that customer service was part of the Claimant's motivation. There were some inaccuracies recorded in that the Claimant had not entered the ticket office without permission. The findings did not record that the Claimant had demonstrated in some detail what he would do differently in future.
  27. The decision was to dismiss the Claimant without notice. The decision was confirmed in writing on the same day. In evidence Ms Northfield expanded on the reasoning for that sanction. The Respondent is highly regulated. She was concerned from things he had said in the fact finding and her own hearing that the reason he would not do it again was because of the disciplinary process not because he would adhere to rules and regulations. She considered there was a risk he would ignore rules again. We do not agree that this concern is backed up by the interview taken as a whole. We find it relevant that she missed from her summary what the Claimant said in some detail he would do differently in future. We also note that the comment about the disciplinary process meaning he would not repeat the conduct does not appear in her disciplinary hearing but in the appeal decision of Mr Kirk ("You have told me that you would not repeat this episode because of your experience in going through the disciplinary process. I am not convinced by either your representative's account or yours that you acknowledge the importance of following company procedure on handling cash/Ticket Office security" (p281)).

28. Ms Northfield also dealt with the disciplinary hearing of the Ticket Office colleague on the same day. She decided not to dismiss the colleague although he was directly responsible for a number of breaches of the payment handling procedures (pages 96-99), with the result that this incident occurred. He should have locked the internal door to the Ticket Office while he popped out; suspended his till; locked the safe; and pulled the blind down on the window. It transpired that the internal door was regularly being kept open in contravention of the procedures. He had stepped out to the shop. Procedures expressly say that he is responsible for transactions during his shift which is why he should always suspend his till.
29. The penalty given to the colleague was a final written warning. Ms Northfield's reasoning was that his breaches were serious but that he should not be considered responsible for the Claimant selling the ticket (contrary to the policy which says he is responsible for transactions on his shift).
30. Both the Claimant and his colleague appealed and both appeals were dealt with by Mr Kirk. The Claimant's appeal is at page 272. The Claimant said the decision was extreme, both because of the nature of the offence, his intentions to help the customer and because of the differing penalty given to his colleague who kept his job.
31. The Claimant's colleague's appeal was dealt with first and his penalty was reduced to a first written warning. The period of the warning was also reduced from 24 months to 12 months.
32. In the appeal hearing on 25 April 2018 the Claimant maintained his position that he accepted he had done wrong, but his representative sought to minimise the Claimant's role and said that the Respondent had overreacted. We find the Claimant's representative did misjudge the situation to the extent that he said he would have done the same as the Claimant and that the Claimant should have been praised for what he did. However the Claimant's representative did acknowledge the Claimant had done something he should not have, that he should do differently next time and that it warranted a corrective conversation by the Respondent. The Claimant confirmed he would not do it again.
33. We are satisfied Mr Kirk did then adjourn to consider the issue before making his decision to uphold the decision to dismiss without notice. His decision and the reason for it are at pages 280-281. In his conclusions Mr Kirk recorded the Claimant's representative's statements, but only the extreme parts and not the contrite parts. He quoted the representative as stating "you 'did nothing criminally wrong' and there was no loss of revenue ...as a result of your actions. This was a 'non-event' with, effectively, no case to answer...in his opinion, you did nothing wrong – you used your initiative to assist a customer who wanted to buy a ticket". He did not record the Claimant's position. The Claimant had said at the meeting "I would just like to put my hands up, I have done wrong..." He also said he would not do it again "I wouldn't touch it". Overall we find the summary is not a fair reflection of the Claimant's position.

34. Mr Kirk acknowledged that the Claimant would not repeat this episode because of his experience of the disciplinary process yet he said he was not convinced that the Claimant acknowledged the importance of following Company procedure on handling cash and Ticket Office security. He found the Claimant had taken the choice to sell the ticket contrary to the regulations and it was a serious breach of the regulations.

### **Relevant law**

#### **Unfair dismissal**

35. The test in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

**(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-**

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

**(2) A reason falls within this subsection if it-**

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

**(3) . . .**

**(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-**

- (a) 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.**

36. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.
37. In applying section 98(4) 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 the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

**Discrimination arising from disability**

38. Section 15 Equality Act provides:

“(1) A person (A) discriminates against a disabled person (B) if—

- (a) A treats B *unfavourably* because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.

39. The Tribunal must first identify unfavourable treatment and by whom [person A].... The Tribunal must then determine what caused the treatment or the reason for it. “The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required....there may be more than one reason...The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it...Motives are irrelevant. (*Pnaiser v NHS England and anor* UKEAT/0137/15).

**Conclusions**

**Unfair dismissal**

*What was the reason for dismissal? Was it the potentially fair reason of conduct?*

40. We accept this was a conduct dismissal. We are satisfied the Claimant's disability had nothing to do with the decision. He was dismissed for overstepping his authority and doing an unauthorised task in selling the ticket to the customer. He was not dismissed due to capability. The capability procedure was progressing separately and had not concluded.

*Was the decision reasonable? Did the Respondent have a genuine belief in misconduct, based on reasonable grounds after a reasonable investigation? Was it within the range of reasonable responses to dismiss?*

41. Ms Northfield and Mr Kirk had a genuine belief that the Claimant had over stepped his authority and issued a ticket without authorization, based on reasonable grounds after a reasonable investigation.
42. However, there were errors in the process. Ms Northfield recorded in her conclusions that the Claimant's presence in the office was unauthorized which she accepts was not true. She recorded it as an aggravating factor to the incident. On appeal this was not corrected. In Mr Kirk's confirmation of the hearing the reason for the hearing remained "gross misconduct in that ....you entered the ticket office without permission ....then issued a ticket to a customer...which you had no authority to do". He went on to say in his reasoning "there were clear breaches of the Booking Office/Cash Security procedure insofar as the TO area, till and Star machine were not secured. The person responsible has been dealt with through the disciplinary procedures. The opportunity to access this area and use the Star machine to sell a ticket may have existed but it was your choice to take that opportunity, contrary to regulations." This shows the Claimant was still being treated as having entered the office without authorization.
43. Also, neither Ms Northfield nor Mr Kirk fully took account of the Claimant's contrition. Both either missed it or misrepresented it in their summaries as we have described at paragraphs 25-27 and 32-34.
44. We find dismissal outside the range of reasonable responses. We agree that the Claimant's actions constituted misconduct and warranted at least a warning but we do find it outside the reasonable range to dismiss. The Claimant's motive was to assist a customer, albeit misguided, and there was clear contrition and acceptance he should do differently in future from the Claimant in both meetings and expressed by both of his representatives as well. There was no dishonesty, no loss, no mal-intent. There was misjudgment by the Claimant. Any concerns about the misjudgment could be addressed through coaching. We find the reason the Respondent has considered it more serious than it was is based on the errors Ms Northfield and Mr Kirk made in the process – finding incorrectly that he was not even authorised to be in the office, and overlooking in their summaries the clear evidence of the Claimant's contrition and willingness to learn an appropriate response in the future. Mr Kirk at the appeal concentrated not on the Claimant's own position but on the misjudgment of the Claimant's representative in over-trivializing the offence, ignoring the fact he also acknowledged the behaviour was wrong and the Claimant would act differently in future.



45. We have been alert to the fact that we should not substitute our view for that of the Respondent but we do find dismissal to be an unreasonable response for this offence and that these errors contributed to this.
46. We do not find that the two cases of the Claimant and his Ticket Office colleague are sufficiently similar to directly compare but it is relevant that the Claimant's colleague was not dismissed. He breached the rules in relation to cash handling and Ticket Office security in many more ways and the rules hold him responsible for anything untoward which occurs as a result of his not following procedures. He is at least just as culpable. Yet his penalty was reduced to a first warning on appeal. That he was not dismissed, despite the number of breaches, and even allowing that he was the one that reported the incident, confirms our view that dismissal for the Claimant's part was outside the range of reasonable responses.
47. We note that mitigation for the Claimant's colleague which was the basis for the reduction in his penalty on appeal was the Claimant's actions and how unexpected the Claimant's conduct was, and that the representative had never heard of a similar occurrence before. This was after the colleague's hearing in which the colleague's union representative placed the blame on the Claimant. That meeting occurred prior to the Claimant's appeal meeting and the colleague's case about the Claimant's conduct being to blame was not shared with the Claimant. Mr Kirk told us that he had not taken the colleague's appeal into account in the Claimant's appeal, but did use in his own evidence similar terminology in explaining his decision in respect of the Claimant. We find it likely he was influenced by it and the Claimant was not aware of it and not able to comment. This can be the danger of the same manager hearing both cases.

*Is there a chance the Claimant would have been dismissed fairly in any event?*

48. We considered whether the Claimant might have been dismissed fairly in any event at some stage due to the concurrent capability process, in which he had already had a final medical capability hearing which was adjourned on 12 March 2018 for a further medical review. We find nevertheless that we cannot say there is a chance the Claimant would have been fairly dismissed for capability. That process was not over and the Respondent accepts now that the Claimant had a disability at the relevant time. We would need to consider the question of reasonable adjustments to make a fully informed decision. We have not had sufficient evidence to determine that. There is also the possibility the Claimant would have found another post such as the post in Victoria that he had applied for.

*Did the Claimant contribute to dismissal?*

49. We have found the Claimant committed misconduct that warranted a warning and that he therefore did contribute. We find his contribution significant, but less than 50% as he should not have been dismissed for it. We consider it just and equitable to reduce the Claimant's award by 30% as a result.

**Wrongful dismissal**

*Did the Claimant commit conduct which justified withholding notice?*

50. We do not consider the Claimant's misconduct to be gross misconduct. We do not consider it sufficiently serious to justify withholding notice as we find it outside the range of reasonable responses to dismiss at all. It was not a repudiatory breach going to the trust between the parties. The Claimant held his hands up and admitted he had done wrong, he explained his misjudgment about customer service and was coachable to avoid it happening again.

**Discrimination arising from disability**

51. The Respondent accepted dismissal was unfavourable treatment. The issue is whether it was because of something arising from his disability.

*Do the Claimant's actions on 12 January 2018 in issuing a ticket to a customer amount to "something arising from" his disability?*

52. It is accepted the Claimant was dismissed for issuing a ticket to a customer but the Claimant claims this was something arising from his disability because he only had access to the ticket office because he was on restricted duties because of his disability. The selling of the ticket was not something arising from the Claimant's disability. He was on restricted duties because of his disability but he made his own judgment to conduct an unauthorized transaction that had nothing to do with his ankle condition.

*Was the Claimant's inability to undertake the full range of contractual duties something arising from his disability? Was the real reason for the Claimant's dismissal the fact that he was on restricted duties/subject to the capability process?*

53. Even though the two processes were running concurrently we are satisfied that Ms Northfield and Mr Kirk were not at all motivated by the restricted duties/capability process. We do not know what the outcome of that process would have been. We are satisfied that the Respondent makes reasonable adjustments in respect of disabled colleagues from time to time; and the Claimant's final medical capability meeting had been adjourned to find out more. The Respondent had not taken the first opportunity to dismiss for incapacity at that final medical capability meeting. The Claimant had been absent or on restricted duties longer than the period given in the policy for redeployment. The 16 week period once commenced had been extended, but also the 16 week period was not started as soon as the need for restricted duties was identified.
54. It was not necessary to consider the remaining issues as we do not find that the Claimant was treated unfavourably because of something arising from his disability.

.....  
Employment Judge Corrigan  
23 January 2020