EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr B Hoy	**AND**	Abellio East Anglia Ltd t/a Greater Anglia

Heard at: CVP **On**: 7, 8 & 11 January 2021

Before: Employment Judge Adkin

Representation
For the Claimant: Mr P Livingston
For the Respondent: Mr A Sendall

JUDGMENT

(i) The claim of unfair dismissal brought pursuant to section 98 of the Employment Rights Act 1996 ("ERA") succeeds, subject to a 100% 'Polkey' reduction of the compensatory award and a 50% reduction of the basic award under section 122(2) ERA.

(ii) The Tribunal will not order reinstatement or re-engagement pursuant to sections 113-116 ERA.

(iii) The Respondent is ordered to pay the Claimant the sum of **£6,037.50**.

WRITTEN REASONS

1. This is a claim for unfair dismissal brought by the Claimant in a claim presented on 24 March 2020 arising from his dismissal for misconduct on 13 November 2019.

2. The claim of section 15 discrimination under the Equality Act 2010 was withdrawn on Thursday 7 January 2021.

Evidence

3. I have been presented with a hearing bundle of 258 pages to which a supplementary couple of pages were added during the course of the hearing.

4. I have received witness statements from the Claimant, Mr Hoy, from the dismissing manager Mr David Murphy and from the appeal manager Mr Alvin Wedderburn. All three of those people have given oral evidence and been cross examined.

5. I have received an updated schedule of loss which replaces the one in the bundle.

Issues

6. The agreed list of issues in this case is as follows:

> 1. The Claimant was summarily dismissed on the 13 November 2019. Was the Claimant dismissed for a potentially fair reason within Section 98 ERA 1996? The Respondent relies on conduct.
>
> 2. Applying the Burchell test,
>
> (1) Did the Respondent have a genuine belief in the Claimant's guilt?
>
> (2) Were there reasonable grounds on which to base that belief?
>
> (3) Had the Respondent carried out as much investigation as was reasonable in the circumstances?

3. If so, was the dismissal within the range of reasonable responses available to the employer?

7. I find that the Claimant was dismissed for conduct which is a potentially fair reason. This was not in dispute.

8. Suffice it to say that no significant challenge was made under the Burchell test but Mr Livingston has quite realistically focused his attention on sanction and process.

Findings of Fact

9. The Claimant commenced employment on the 3 September 2001 as a train driver for the Respondent.

10. On 3 January 2019 the Claimant had degenerative disease diagnosed and leading to some substantial absences. He was absent from February 2019 until August 2019.

11. On 19 August 2019 the Claimant returned to work after a lengthy absence.

12. In September 2019 he attended a training course, this was required as I understand it to regain competency but also to receive training on new trains using a mixture of classroom training and a simulator.

The incident – 17 September 2019

13. On 17 September 2019 the Claimant was due to attend the second day of the training course which was taking place at Stratford in East London. In the morning however he signed in sick, as a result of having had a very poor night's sleep due to pain in his arm. He explained he was unable to take medication because of the risk that that would mean he was not able to carry out his duties.

14. Having reported in sick the Claimant had some sleep and then later in the day changed his mind about attending work. Rather than speaking to a line manager or getting authorisation what he did was to attend his local train station at Bishop's Stortford in uniform and joined the train in the driver's cab. This train

was being driven by another driver Mr Paul Forbes and the Claimant joined in his uniform without any prior authorisation or a cab pass.

15. This train failed to stop at Northumberland Park station which led to an investigation. One of the outcomes of that investigation was that disciplinary matters were then pursued against the Claimant. On 17 September it seems that the Claimant told Mr Forbes or at least Mr Forbes told investigators that the Claimant was "road learning", this meant that in practice he was refamiliarising himself with a route that he was otherwise reasonably familiar with. This is what Mr Forbes told the investigators in an investigation on that day.

16. Mr Forbes was interviewed by Mr Watson on 17 September which was the date of the incident and he gave an account of events that appears starting at page 63 in the bundle.

17. Also on 17 September the Claimant himself was interviewed by Mr Watson [page 66], this was described as an informal interview but I note that full meeting minutes were taken of that meeting. The Claimant was asked if he had authorisation to be in the driving cab, he said no. He was asked if he knew how to obtain authorisation to be in the driving cab and he said yes, through a manager. His explanation for being on the train was an error of judgment. He confirmed that he was in full uniform. He explained that he was hoping to get access to the simulator at the academy and explained the circumstances of not sleeping well due to a pain in his arm. He said he thought he was being pro-active. He was asked if he had phoned the duty train manager to put himself fit for duty, he explained that no he thought he would go to the academy first and then put himself fit for duty if he was able to resume his training. He explained that first thing in the morning he had tried to get a telephone number for the training academy but there was none available.

18. The Claimant was asked (page 67) what he would do differently next time in response to which he said

> "I know I can't be trespassing on the railway and I will contact my manager and the DTM, I also wouldn't travel in the driving cab without authorisation".

19. Mr Forbes was interviewed for a second time on 20 September during which time he confirmed that not only the Claimant but Mr Carter another driver was present in the cab although Mr Carter had left before the incident and he said that they did not distract him in any way at that stage.

20. There was then an "operational incident review report" that was issued on 5 August where two incidents were investigated or at least summarised both involving the same driver Mr Forbes, the second of which was relevant for present purposes. Mr David Murphy chaired that review. The conclusion of that report was that there was a low actual and low potential risk of injury. The conclusion was there was no risk of injury as the driver made no attempt to stop at either station.

21. On 18 September at page 77 of the agreed bundle the Claimant set out in his own words a full account of the events of the day.

> Prior to departure of the 14:15 service to Stratford I asked the driver if I could ride in the cab to observe the route as I had not driven a train since February. The driver said yes. On departure from Bishops Stortford I asked the driver if he knew the next booked stop and he replied yes. On approach to the station he used verbal speech to say the length of the train and at arrival at the stop boards said which side to do door release. On departure I observed he used a yellow marker to strike through the stops on his Sheila [*jargon for a paper form*]. He did this for all stop he made. I did not speak to him on approach to station ramps or during coming [*sic*] to a stand at stop boards or during door release procedures. On arrival at Broxbourne I asked him the next booked stop and he said Cheshunt. Discussion of the rail network and changes in our root [*sic*] happened between some stations but most conversation after Cheshunt, notably he told me about the changes that included stop boards beyond station platforms, which required drivers to take trains past platforms to our on track stop board. He pointed them out to me as we passed by them. We remarked about the risks this would cause drivers. On approach to Angel Road he said station was not in use and I said to him I had seen the weed growth that had overgrown the station. Going through said I should have stopped there. On arrival at Tottenham Hale station he made an announcement telling passengers to cross the footbridge for services back to Northumberland Park. He then asked me what now and I replied you must call the signaller and report it. I think he was a bit in shock but did so and followed the instructions he was given. I remained in the vertable [*sic*] and at Stratford I

> called my depot to report the incident as no manager was available at that time at Stratford. If I recall any other important information other than what I am asked at interview I will speak to a manager.

Investigator's conclusion

22. The conclusion of the investigator Mr Trevor Sharp was that the driver had been distracted, notwithstanding a denial by Mr Forbes at one stage in the investigation. Mr Forbes made somewhat contradictory comments on whether or not he had been distracted. Mr Sharp found Mr Forbes had been distracted by the Claimant who was in the cab without the correct documentation, stating that he was route learning. The investigation summary report was produced on 21 October.

23. A short summary of each piece of evidence gathered was set out on page 103. It is summarised that Mr Forbes stated that he was having quite a long conversation with Mr Hoy about the Lee Valley reversible and was going too fast stop at Northumberland Park. Mr Forbes admitted that he was distracted by Mr Hoy's presence and he did not ask him to produce any ID or a Pass also on page 103.

24. Mr Hoy's evidence is summarised as being that he been to see the route as he had been off work for several months and had a summary assessment soon. He confirmed that he did not have authorisation but demonstrated that he knew how to obtain authorisation. Also in the investigation as was summarised at page 105, a manager Mr David Whiffin was asked whether Mr Hoy had been given authority to ride in the front cab for route learning. Mr Whiffin denied it. The investigator concluded that this was not authorised.

25. In fact the Claimant went further in his evidence in this hearing, when he admitted that he been told by managers not to route learn.

Sanctions for other drivers

26. Mr Forbes the driver of the train and Mr Carter, who was another unauthorised driver riding in the cab received disciplinary sanctions less than dismissal. The Claimant was not aware of the disciplinary outcomes, until

learning of that in these proceedings.

Disciplinary

27. An invitation to a disciplinary hearing in a letter dated 25 October 2019 set out five charges:

1. That on 17 September 2019, you were in the front cab of her service without having the relevant pass or in accordance with cab protocol.

2. That on 17 September 2019 you disregarded a Driver Manager instruction regarding your current duties due to being out of driver and medical competence for safety critical work.

3. That on 17 September 2019, provided false information to the driver of this service to gain access into the driving cab.

4. That on 17 September 2019 you knowingly failed to carry out the correct procedure for resuming from sickness, in accordance with the local agreements laid out in Bishops Stortford depot booking arrangements 2001.

5. That on 17 September 2019 you were in work whilst off sick, and unauthorised to be there.

28. There was a disciplinary hearing which took place on 13 November 2019. At that hearing the Claimant attended and was represented Mr Ray Williams, a union representative.

29. The five charges were discussed. It was the view of the union representative Mr Williams that charges four and five should be amalgamated on the basis that these charges were almost entirely or substantially overlapping. There were a number of points of dispute in this meeting, including the fact that Mr Forbes had not made himself available as a witness to give evidence. The Claimant in this meeting did make some concessions in relation to being there unauthorised, but there were also some points lf evidence that were in dispute and also points of procedure that were in dispute.

Dismissal

30. Mr David Murphy, who gave evidence to the Tribunal, decided to dismiss

the Claimant. Reasons for the dismissal were set out in a letter of dismissal dated the 14 November 2019:

(1) That on 17 September 2019, you were in the front cab of her service without having the relevant pass or in accordance with cab protocol.

You have accepted this charge and I accept that this would ordinarily have been heard under a Form 1 [a procedure for less than gross misconduct] therefore sanction for this charge will be a severe reprimand.

(2) That on 17 September 2019 you disregarded a Driver Manager's instruction regarding your current duties due to being out of driver and medical competence for safety critical work.

I take on board your comments regarding the driver manager instruction being dated the 17th September. As a result of this I will disregard this charge.

(3) That on 17 September 2019, provided false information to the driver of this service to gain access into the driving cab.

I also take on board the discrepancies in the statements made by Paul Forbes, Alan Carter and yourself and as a result I will disregard this charge.

(4) That on 17 September 2019 you knowingly failed to carry out the correct procedure for resuming from sickness, in accordance with the local agreements laid out in Bishops Stortford depot booking arrangements 2001.

You knowingly disregarded the correct procedure for resuming from sickness so for this I am issuing you with a reprimand.

(5) That on 17 September 2019 you were in work whilst off sick, and unauthorised to be there.

You made a concerted effort to attend work in full uniform whilst off work sick and gained entry into the driving cab knowingly unauthorised to do so. You disregarded the rules and processes and iodine this gross misconduct.

You have the right to appeal against this decision and if you do so this must be in writing (within seven days). The basis of this appeal can either be that you feel the facts were not properly presented or that the punishment was too severe.

Appeal

31. The Claimant took up the opportunity to appeal that decision on both bases which he did in the letter of 18 November 2019.

32. An appeal hearing that took place on 2 December 2019.

33. The Claimant was again represented by Mr Ray Williams union representative. The appeal manager was Mr Alvin Wedderburn.

34. It is not proportionate to set out the content of this meeting in detail. There was some discussion about the charges. In particular about whether it had been agreed that the dismissing manager would amalgamate the charges 4 and 5 or whether he simply agreed that he would consider that suggestion. The Respondent's case is that he decided not to amalgamate those charges. It seems to me quite plausible that the Claimant's representative got the impression that there had been an agreement to amalgamate but in fact all Mr Murphy was doing was agreeing to consider the point.

35. The appeal outcome was communicated on 4 December by letter. The outcome was that the fifth charge and outcome was converted from gross misconduct to "serious misconduct". The consequence of that was that what had been a summary dismissal without notice was replaced with a dismissal on notice, with the effect that the Claimant would receive notice pay.

EVIDENCE

36. My finding was that at the liability stage all three witnesses who had given evidence to the Tribunal did so truthfully and attempted to do their best to recall material events.

37. The Claimant was scrupulous in his evidence on liability to give an accurate account of the best of his recollection of events. All witnesses, gave a truthful account.

38. I noted the Claimant's evidence that he accepted that he did not have

authority to be in the train's cab. He explained to me that the process was he needed either pass or signed piece of paper and that would be stamped by manager and he did not have either of those things. He accepted that he was out of competency and he was he had been off sick for a long period and was not up-to-date with the relevant tests and to drive a train on this particular stretch of track and he accepts that he did not advise the duty manager. He did not follow the policy which was to give at least 12 hours' notice and of intention to return to work from sick leave.

39. Further, the Claimant accepts that he was told not to carry out route familiarisation. I was conscious of the fact that this went somewhat beyond evidence that had been given in the investigation. I been very clear in my mind to distinguish between what was part of the investigation and evidence that I've received in this hearing for the purpose of the exercise of detailing whether the dismissal was unfair.

40. The Claimant denied distracting the driver. He gave evidence during the course of the Tribunal hearing that he been giving some quite detailed guidance to the driver about and stopping procedure at stations preceding the incident. He certainly accepted that he was in conversation with the driver who was driving the train.

41. The Claimant accepted that he made an error of judgement in his evidence to the Tribunal and that is consistent with what he said and during the course of the internal investigation.

Submissions

42. I have received written submissions, able submissions from both counsel.

CONCLUSIONS

43. None of the aspects of the Burchell v BHS test were seriously argued by Mr Livingstone as indicating an unfair dismissal. That I was a realistic position for him to take.

Severity of sanction

44. I have been referred the case of Quintile Commercial UK Ltd v Barongo (UKEAT/0255/17/JOJ). Mr Livingston highlighted paragraph of the judgment of HHJ Eady QC, i.e. "It may be in most cases" an ET will find that a conduct dismissal for something less than gross misconduct will fall outside the band of reasonable responses, but it should be careful not to simply assume this is so.

45. In that case Q had followed an approach similar to the appeal manager in the present case and determined that the Claimant's conduct was properly to be characterised as 'serious' rather than 'gross' misconduct. Q's appeal manager still, however, concluded he should remain dismissed, although this was to be on notice rather than a summary dismissal. The EAT inferred that the ET had proceeded upon assumption that once the misconduct was characterised as serious and not gross this was not a case where an employer could fairly dismiss. The EAT confirms that it is impermissibly rigid of a tribunal to assume that dismissal for misconduct found to be less than gross misconduct will make a dismissal unfair. The test to be applied is a "band of reasonable responses" test and the wording of section 98(4) ERA.

46. Section 98(4) contains the following:

> …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.

47. It follows that the fact that the appeal manager downgraded the charge from "gross misconduct" to "serious misconduct" does not in itself make the dismissal unfair. The Tribunal must consider all the circumstances and the application of section 98 and the band or range of reasonable

responses test.

48. *Whether safety critical* - the next submission put forward by the Claimant is that Respondent's dismissing manager Mr Murphy wrongly referred to the Claimant's role as safety critical. He argues that this was an irrelevant consideration given that the internal investigation which characterised the actual and potential risks as low.

49. Looking at it narrowly, I accept that there is no finding in the investigation and that the Claimant's actions had on this occasion caused a particular safety incident. Looking at the matter more broadly however and particular hearing the evidence of Mr Murphy, he was entitled to take account of the fact that the incident occurred in a safety critical context. The driver's role is safety critical role. It is clear that the Respondent has strict rules and procedures, including rules about who is within the driver's cab and in what circumstances and when they can attend the cab. The Respondent is entitled to strictly enforce rules that relate to that. Despite the finding of "low" risk of an incident caused by a driver missing a station, the investigation concluded that the driver had been distracted. I accept that this is the safety critical context in which the rules are made and the Respondent's dismissing manager was entitled to take breaches of the rules seriously. I do not find that the approach of the dismissing manager in relation to this took the decision to dismiss outside of the range of reasonable responses.

<u>Process/Procedure</u>

50. *Process* – there has been a dispute between the parties as to what the appropriate documents were regarding the disciplinary policy. The evidence on this point has been somewhat unclear. I have had do my best to make sense of the situation where there is an absence of a clear paper trail as to how this current policy has come into force.

51. The only clear witness evidence on which the parties agree is that document at page 167, which is a disciplinary policy and procedure dated 7 December 2016 was in force at the time of the material events. I will

refer to this as the **2016 wording**. What is described as the disciplinary policy is less than a page. The disciplinary procedure is three pages (168-171).

52. Page 29 is the terms and conditions of employment dated 14 April 2003. This contains (page 35) Annex C "noncontractual rules, regulations and policies". Of particular relevance is section 2 (pages 36-37) "Disciplinary Rules and Procedures". The footer at the bottom of the page suggests that this dates from January 2000, and accordingly I will refer to this as the **2000 wording**:

> 2.1.1 As a condition of your employment you are subject to and are required to conform with Rules and Regulations applicable to employees of WAGN which may from time to time be in force and applicable, and to become thoroughly acquainted with those rules and regulations relevant to your work.
>
> 2.1.2 You are subject to a procedure that may be applied in any situation where you are considered to have committed a breach of discipline. A memorandum of Agreement relating to the Disciplinary Procedure (including details as to appeal) is available for you to see in Procedure Agreement 4: Discipline
>
> …
>
> 2.2 Exceptionally Grave Misconduct
>
> The following at of misconduct are categorised as exceptionally grave misconduct for which dismissal may be considered appropriate apart from any legal action that may be called for:
>
> 2.2.6 conduct endangering persons or damaging property whilst on duty
>
> 2.3 Less Serious Misconduct
>
> Breaches of a lesser degree of seriousness for which action short of dismissal will **normally** be appropriate are:
>
> 2.3.13 disobedience of rules or instructions
>
> [emphasis added]

53. As to the status of the 2000 wording, it's the Respondent's position is that with the effluxion of time and new policies coming out and so on, these

provisions are no longer applicable. I do not have any evidence in support of this. By implication, the Respondent argues, they have been replaced by the 2016 provisions (167).

54. I have considered this carefully. It seems to me that the document at page 37-38 (the 2000 wording) is different in nature to the document at 167-171 (the 2016 word). Pages 37-38 in fact seems to be a part of the contractual terms or at least an annex of contractual terms which refers to a separate Procedure. It does not purport to be a disciplinary policy or procedure in its entirety, but it does have provisions regarding severity of misconduct. Given its brevity it seems to me unlikely that it does amount to an entire disciplinary policy or procedure.

55. In the absence of any evidence that this has been replaced by another document, the conclusion that I come to on a balance of probabilities is that the 2000 wording is still in force and is supplemented but not replaced by the 2016 wording.

56. The significance of that conclusion, the Claimant argues, is that the findings of the disciplinary process in this case would fall into the "less serious misconduct" category rather than the "exceptionally grave misconduct" category. This point is not conclusive. I note the use of the word "normally" above.

57. There is also an implication for the Claimant's arguments raised under Lock and Cardiff case, below.

"Serious misconduct"

58. The next argument that is put forward by the Claimant is that serious misconduct as described by the appeal manager sits outside of any policy and is not more than his invention. It follows according to this argument that this must be a breach of policy or sit outside of the policy.

59. The appeal manager was doing no more than describing a situation that was at the serious end of misconduct, but falling below gross (or grave) misconduct. I do not find that the use of this language is such as to take

this dismissal outside of the range of reasonably responses, procedurally or substantively.

Form 1 / Section 9: gross misconduct procedure

60. The Claimant has argued that the Claimant's disciplinary matter should not have been on the gross misconduct track at all.

61. The Respondent's disciplinary procedure contains two routes that can be followed. What is described at section 9 (page 168) is for potential gross misconduct cases. The other route, what is described as a Form 1, is for disciplinary matters which are believed at the outset to be less than gross misconduct (i.e. dismissal is not an available sanction). The Form 1 process is described in a document I have not received in evidence. The parties agree however that it governs non-gross misconduct cases.

62. With the benefit of hindsight, particularly given the finding of the appeal manager who downgraded the charge 5 sanction, that the outcome at the appeal stage might suggest that this is a non-gross misconduct case. The difficulty is an that it might have been a gross misconduct case taking account of all of the five charges that were made at the beginning of the outset of the disciplinary process. It's not obvious to me that there was an error in treating this as a section 9 potential gross misconduct case.

63. Returning to the Lock v Cardiff Railway Company [1998] IRLR 358 argument. The Claimant argues that the decision to dismiss is a substantively unfair, given that the disciplinary policy does not set out the likely consequences to an employee breaking rules other than a general sense. It is argued that what is gross misconduct is nowhere documented. In view of my findings about the status of the 2000 wording (pages 37 and 38) that argument falls away, given that there is a definition set out within those policies.

Failure to take account of mitigating circumstances:

(i) Length of service

64. The next argument of the Claimant is that there was a failure to take

account of the Claimant's 18 year service. That is part of a broad argument about failure to take account of a number of potentially mitigating matters including reason for the conduct and remorse/acceptance of the allegations.

65. The evidence on this point was quite singular. Both the dismissing manager Mr Murphy and the appeal manager Mr Wedderburn did not take account of the Claimant's length of service at all.

66. In *Strouthos v London Underground* [2004] IRLR 636, the Court of Appeal considered the significance of long service. At para 31 Pill LJ said:

> " … it all depends on the circumstances. The statements in McLay and Cunningham do not, in my judgment, exclude a consideration of the length of service as a factor in considering whether the reaction of an employer to conduct by his employee is an appropriate one. Certainly there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response, is a matter of judgment and, in my judgment, length of service is a factor which can properly be taken into account, as it was by the employment tribunal when they decided that the response of the employers in this case was not an appropriate one."

67. The ACAS "Disciplinary and Grievances at work" Guide 2015 provides the following:

> "What should be considered before deciding any disciplinary penalty?
>
> When deciding whether a disciplinary penalty is appropriate and what form it should take, consideration should be given to:
>
> …
>
> - the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service
>
> - any special circumstances which might make it appropriate to adjust the severity of the penalty

68. The editors of *Harvey on Industrial Relations and Employment Law* in commenting on the significance of length of service, draw a distinction between cases of gross misconduct and cases falling below gross misconduct, suggesting that it was more likely to be a relevant consideration in the case of the latter. They also make this observation (Harvey's Division DI Unfair Dismissal/0. Misconduct/C. Conduct and Reasonableness/(6) Was dismissal a fair sanction/(g) Length of service:

> "It is perhaps curious that there is relatively so little direct authority on the point, but perhaps it is one of those cases of something considered too obvious to need constant restatement."

69. The editors of IDS Handbook on Unfair Dismissal offer this:

> Mitigating circumstances
>
> 6.216 Matters such as provocation, **long service** and good conduct will always be relevant to the question of reasonableness.
>
> [emphasis added]

70. I recognise that commentary in Harvey's and IDS and guidance in ACAS does not in itself have the status of law. However they are all respected sources of guidance. I have used this guidance in establishing what is the range of reasonable responses.

71. I consider that in the circumstances of this, in particular for individual charges that were found on appeal to amount to less than gross misconduct, the failure give any consideration at all to the Claimant's 18 years' service, a significant period as mitigation, did take the decision to dismiss outside of the range of reasonable responses.

(ii) Reason for conduct

72. The Claimant argues that the Respondent failed to take account of the reason for conduct as a mitigating circumstance. The reason put forward by the Claimant was that he wanted to get to his training and was trying to

avoid taking another day off sick. It is said that there is a lack of a nefarious reason or ulterior motive. It is clear from paragraph 35 of Mr Murphy's statement however that he was engaged with the question of the Claimant's motivation but did not have such a positive interpretation of it.

73. This was not a situation in which the Claimant's motivation was clearly unimpeachable. He had admitted an error of judgement. It was open to interpretation. It seems that Mr Murphy engaged with this to some extent.

74. I do not find that this argument leads me to conclude that the dismissal fell outside of the range of reasonable responses.

Acceptance of allegations/remorse

75. It is argued that there was a failure to take account acceptance of allegations.

76. Some of the charges were accepted specifically charges (1) and (4). The Claimant promised during the disciplinary hearing that it would never happen again [132].

77. Other charges were not accepted, including charge (5), which was found to be established.

78. The Claimant's admissions in relation to charge 1 are clear on the first page of the letter of dismissal. The admissions in relation to charge 1 and charge 4 are referred to in Mr Murphy's witness statement. To that extent at least these points appear to have been in the mind of the dismissing manager. They do not appear to have been expressly identified as mitigating circumstances.

79. I'm not satisfied that in circumstances of this case that there was a failure to take account of allegations admitted such as to take the decision to dismiss outside of the range of reasonable responses.

Irrelevant considerations

80. The Claimant's next argument is alleged consideration of irrelevant

matters.

81. It is said that the Respondent took account of an alleged worst-case scenario unfairly. As discussed above my conclusion is that Mr Murphy was entitled to take account of the context of a safety critical work environment. I do not find that this was an irrelevant consideration and do not find that this consideration takes the decision to dismiss outside of the range of reasonable responses.

Inconsistent treatment

82. The Claimant made a comparison with the two drivers who were not dismissed. Mr Forbes who was driving the train. Mr Carter who was another unauthorised driver riding in the cab, albeit at a point before the non-stopping at station incident.

83. Mr Livingston for the Claimant put this argument with some care. He was careful not to say the circumstances of the drivers were identical. He was asking me to consider similarities between the charges

84. The circumstances of two other drivers were different. Mr Forbes was an inexperienced driver. He received a final written warning. Mr Carter received a reprimand. Neither Mr Forbes nor Mr Carter were signed off sick on the date of the incident. There is no evidence that they were out of competency (i.e. no evidence that their training had lapsed).

85. This is noteworthy also that those drivers were dealt with some different to the dismissing manager in Mr Hoy's case.

86. Taking account of the case law on inconsistency, I do not consider that the cases are sufficiently similar to take the decision to dismiss the Claimant outside of the range of reasonable responses. There are differences. Given that the disciplinary sanctions issued all related to the conduct on the same day, this is not a situation for example in which the Claimant had been led to believe that certain conduct was acceptable by virtue of lenient treatment given to colleagues for similar conduct on earlier occasions.

Polkey

87. Following *Polkey v AE Dayton Services Ltd [1987] UKHL 8* it is open to Tribunal to make a reduction to the compensatory award, on the basis that, had the dismissal been fair there was still a possibility or likelihood of a dismissal taking place.

88. I have found the dismissal unfair for the single reason that length of service was not considered.

89. Considering the decision to dismiss substantively, aside from the length of service point, I find this was a decision within the range of reasonable responses. I consider it a harsh decision and I certainly anticipate that some employers would not have dismissed in the circumstances of this case. The fact that charge 5 is not gross misconduct is something acknowledged by the appeal manager. I have considered that there are a number of elements of the disciplinary matter, and the charges should not be viewed in isolation. There are number of charges that are made out.

90. As a variety of appellate decisions have made clear, the range or band of reasonable responses reflects a range of different but potentially fair outcomes in response to the same circumstances. In other words, in response to identical conduct one employer might dismiss and another might give a written warning. It seems to me that this is probably a classic case of that.

91. My finding is that it was open to an employer to dismiss fairly provided they had taken account of the length of service question.

92. What would have happened had this point been considered? My finding is that in the circumstances of this case it would have made no difference had the Claimant's length of service been considered. This is for three reasons.

93. First, length of service is usually considered along with the employee's record. Long unblemished service is typically regarded as a particular mitigating point. In this case, as the Claimant conceded in his oral

evidence, he had a somewhat chequered record. He had a number of "SPADs" – signals passed at danger in the period 2015-2019 and a station overrun in 2017. There had been a failure to call [at a station] in 2016 and a similar incident in 2018. There was an incident with broken train view monitor and involving the Claimant threatening a member of public on the platform. I did not receive documentary evidence of these matters, nor was it made clear whether any warnings were "live". I assumed in the Claimant's favour that in fact there were no live warnings and this was merely history. Nevertheless in my assessment any mitigating aspect of the length of service would in my assessment be counterbalanced by the nature of the history. It could not be said that he had a long and unblemished history.

94. Secondly, I consider that counterbalancing the mitigating point about length of service, essentially the Claimant was experienced enough to know better. This point was considered by an employment tribunal in Somers v Metropolitan Police Authority ET Case No.2318747/10 and cited in the IDS Handbook on unfair dismissal. That is of course a first instance decision and not binding on me. The circumstances of that case were different. Nevertheless I consider that this point has some application in the present case.

95. Thirdly, I take account of the attitude of the dismissing manager Mr Murphy. He took the various breaches of the rules very seriously. I found this was a significant and genuine concern. He, genuinely in my view, felt that he could not trust the Claimant as a result, in a role which is responsible, within a safety critical environment, and requires lone working for long periods.

96. In the circumstances the reduction to the compensatory award I would make under Polkey is **100%**.

Contribution

97. I find that there was a significant degree of blameworthy conduct in this case.

98. The Claimant accepts that

    a. he did not have authority to be in the cab; he didn't have a pass or signed piece of paper.

    b. he was out of competency;

    c. he was signed off sick and had not advised the duty manager of his return to work. He had not followed the process of not less than 12 hours' notice of returning to work, nor at least requested that this be waived.

    d. he was told not to carry out route familiarisation (as I understand it this admission during the Tribunal is really the substance of disciplinary charge 2, in respect of which the dismissing manager gave the Claimant the benefit of the doubt);

99. Finally my finding is that there was element of distraction of the driver Mr Forbes that necessarily must have taken place or at least there was a risk of such distraction taking place.

100. And so, for all for all those reasons I find that there was a reasonably high degree blameworthy conduct on the part of the Claimant caused or contributed to his dismissal.

101. My finding is that there should be a **50%** reduction for contributory fault.

REMEDY

Evidence & submissions - reinstatement/re-engagement

102. On the fourth day of the hearing, I had the benefit of evidence addressing the questions of reinstatement/re-engagement. The was a witness statement from the Claimant together with some supplementary documents and a witness statement from the appeal manager Mr Wedderburn and also some additional documents are exhibited to that.

103. Both counsel produced full written submissions. I was grateful to

both Counsel and appreciate is a lot of work goes into producing the detailed submissions overnight. Both of those submissions were supplemented orally.

Claimant's wishes

104. The first consideration is whether the claimant wishes either to be reinstated or re-engaged, and I can confirm that he does wish it. He very clearly wishes it and has expressed a clear and professional commitment to wish to return to a his role in the Respondent's employment.

Practicability

105. Practicability in this context means more than merely possible, but whether the reinstatement is capable of being carried into effect with success (Coleman v Magnet Joinery [1975] ICR 46, CA).

106. A respondent does not bear the burden the onus of establishing reinstatement is not practicable. It is a question of fact for the Tribunal.

107. *Vacancies* - I have received evidence as to vacancies with the Respondent. It was suggested by the Claimant's counsel that the Respondent was somewhat misleading in the way that they have described the vacancy situation. I did not need to make a finding as to whether the evidence was misleading. What I did find was that 13 drivers were being recruited within the relevant geography that is relevant to the Claimant's employment.

108. What has been portrayed as some sort of inconsistency was slightly more nuanced. At present, the Respondent has a somewhat depressed requirement for drivers due to the circumstances of the Covid-19 pandemic. Nevertheless it seems that recruitment for drivers for the longer-term continues. There is a live recruitment exercise with the deadline at the end of this month (January 2021). This is so that the organisation in the longer term has a pool of individuals that it can draw on to act as drivers.

109. It is clear Mr Wedderburn's witness statement that there is an

ongoing process of training up new drivers. There are various entry points for the lengthy training process. The conclusion I came to regarding vacancies is that this is no bar to reinstatement. In other words there would be a job for the Claimant to go to. There might be a delay in in that happening.

110. *Training* - there is a straight factual dispute between the parties as to whether the Claimant would entirely need to go back to scratch regarding driver training on the basis that he's been out of his role for so long. The Respondent's position was that he would be starting as if he had never driven a train. The Claimant is understandably somewhat sceptical, given his 18 years of experience as a train driver. Taking the Respondent's case at its highest; if the Claimant did need to be trained entirely from scratch going back to first principles, that would be a significant cost but on the other hand, I take account of the fact that that is no more than the Respondent would incur in bringing new drivers into the organisation, which it seems to be in the process of doing.

111. The Respondent contends that the next realistic space for the Claimant to be trained would be 28 June 2021. While this is an perhaps a factor against the Claimant joining I would not, in fact find that this in itself was a bar to an reinstatement. It seems the organisations of the size of the Respondent have lead times for recruitment into roles such as this. There already are, drivers who are in the process of being trained.

112. In conclusion I do not find that the training requirement even taking the Respondent's cases at its highest would be a bar to reinstatement.

113. *Allegation of discrimination* – Mr Wedderburn suggested that his offence at the allegation of discrimination that had been made against him was a reason why reinstatement should not be ordered. Mr Livingston explored with Mr Wedderburn the extent to which the latter may have misunderstood the basis of the allegation of discrimination. Based on that evidence I accept it may be that Mr Wedderburn did not fully understand the nuances of the section 15 claim that was being brought and by the

Claimant and that is not entirely surprising. This is a fairly complicated area. Mr Wedderburn is not a lawyer. My impression is that he appreciated the claim of discrimination in a pretty general sense that it was because the Claimant was disabled. I suspect that he now appreciates that the section 15 claim it is a more subtle a claim which is based on factors that arose from the Claimant being disabled rather than relating to the disability itself.

114. Mr Wedderburn makes the point in his witness statement that the allegation should not have been made. Further, having been made, it should have been withdrawn earlier. It was withdrawn the week before the hearing.

115. I have however reminded myself that a Claimant is protected from unfavourable treatment as a result of raising an allegation of discrimination under section 27 of the Equality Act. I do not find that the position of the Respondent amounts to victimisation. That is not a matter before the Tribunal for determination. It is uncomfortable as an Employment Judge however to see that the fact that an allegation of discrimination raised has potentially caused a difficult situation for the Claimant. I consider therefore that I should simply not to take account of this point at all. I do not find that this goes to establish a lack of practicability or a breakdown in the relationships of between the parties.

Practicability (re-engagement)

116. Were I to consider re-engagement, I have considered the points made by the Respondent that this would mean that the Claimant was going on to a lower salary.

117. I accept that there may be something in the argument that says that this is a reason why it might be thought that the re-engagement order will be less likely to succeed in the longer term. On the other hand, I balance against that the fact that if the Claimant is prepared to accept a position on a lower salary, to some extent that is a matter for him. The onus is on him to make that work. Although I acknowledge that argument, I do not

consider it a bar to an order of re-engagement.

Trust and confidence

118. Trust and confidence seems to me to be, to some extent the crux of the arguments on reinstatement/re-engagement. Some of the considerations that go to the relationship of trust and confidence in this matter overlap with the considerations that will come into play on the third consideration (below), namely whether it's just in circumstances where the claimant has caused or contributed to his dismissal. These points are distinct however and I will consider them separately.

119. The position of Mr Wedderburn is that now the parties are not able to trust each other. I refer to paragraph 4 of his second witness statement, the witness statement produced for this remedy part of the hearing. What he says is the Respondent no longer has any trust or confidence in Mr Hoy. Mr Murphy made it clear in his evidence that he still stands by his personal view Mr Hoy was guilty of gross misconduct and it's also relevant.

120. Mr Wedderburn pointed out that during the course of the hearing, Mr Hoy accepted that he been told by Mr Carol and Mr Whiffin that he was not to engage in route refreshing and yet he still went ahead and used this as his explanation to Mr Forbes when seeking entry to the driver's cab on 17 September 2019.

121. He says, given the nature and extent of the misconduct, both he and Mr Murphy would have very serious misgivings about Mr Hoy's competence and trustworthiness to return to a role within the Respondent and which had any public safety aspect to it.

122. What I need to consider is whether this concern is rational and whether this concern is genuine. It is not what I personally think, but my assessment of the Respondent’s concern. Making an assessment of what is rational does mean I need to scrutinise that the evidence to establish the on the rational basis for that position.

123. During the course of this hearing, continuing into evidence on remedy on the fourth day, the Claimant sought to draw a distinction between “route refreshing”, which he describes the process with an pen and paper, which he had been told not to do and something that he describes as “seeing the route” which is what he said he was doing.

124. As part of the investigation into the matters that led to dismissal at the Claimant was asked the question by Mr Watson the investigator [66]

> Watson: Why was you in the driving cab
>
> Hoy: as I wanted to see the route site I’ve been off work for nearly 7 months

125. There may be in Claimant's mind some distinction between route refreshing and seeing the route. I entirely understand the Respondent's perspective that there is not in reality a distinction between these two. The Claimant was told not to route refresh. I accept that the Respondent rationally genuinely considers that there is a question of trust that has arisen, given that the Claimant did what he was told not to do. I accept that there is a genuine and rational basis for the concern about trust.

126. Mr Livingston argues that Mr Wedderburn is not directly line managing the Claimant and does not work with him directly. This is a point which I acknowledge. I consider that Mr Wedderburn is to giving evidence as a representative of the management team. I accept that this is a concern that Mr Murphy and the management team more generally has. It boils down to this: how do they know Claimant is going to follow instructions in in a role which involves working without direct supervision for quite long periods. That is the concern which I accept is rational and genuine. This is not personal assessment.

127. What I have understood from the evidence has been put forward there is a genuine concern about trust, arising from those matters.

<u>Whether just</u>

128. The third consideration is whether it is just when the Claimant has

caused or contributed to the dismissal.

129. I am focusing on contribution here, not any points arising from Polkey. I am accept the submission put forward by Mr Livingston based on authority that even a high level of contribution and in some of the reported cases there is a higher level of contribution than the present case does not preclude an order for reinstatement or that re-engagement.

130. In this case I do not find that it is just to order either, reinstatement or engagement. This is not simply because of the admitted breaches of a number of rules but due to the concern about route refreshing and which I have already set out in the second consideration above. At this stage, I can consider my own assessment of the evidence rather than merely scrutinising the Respondent's assessment. It seems to me the Claimant was doing something very close to route refreshing and certainly close enough to mean that he was outside of the spirit of the instructions that had been given to him.

131. Mr Livingstone has argued for these remedies with considerable force. I consider he has taken every proper argument could be taken for the Claimant in respect of these remedies. I do not however consider that it is just in this situation in order to order reinstatement or re-engagement.

132. It follows therefore the Claimant will be entitled to financial remedies.

Section 122

133. Finally I have had to consider the effect of section 122 in relation to the basic award, and specifically, section 122(2) of the ERA 1996, which provides as follows

> "where the tribunal considers and that any conduct of the complainant before the dismissal or where the dismissal was with notice before notice was given was such that it would be just and equitable to reduce or further reduce the amount of the basic award to an extent Tribunal shall reduce or further reduce that amount.

134. Accordingly, and I have heard submissions from both Counsel. I accept the submission of Mr Livingstone that it doesn't necessarily follow that of finding a 50% contribution necessarily translates into 50% reduction.

135. I find I should consider the matter in the round. Considering the claimant's conduct before dismissal, and for the all the reasons that were given out when I made the finding of contributory fault and the evidence that we have heard today seems to me that, and 50% is the appropriate deduction and so I will order that there is a **50%** reduction to the basic award.

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Employment Judge Adkin

Dated: 1.2.21……

Judgment and Reasons sent to the parties on:

02/02/21

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For the Tribunal Office