



7210

# EMPLOYMENT TRIBUNALS

**Claimant:** Ms P Esimaje

**Respondent:** Mitie Aviation Security Limited

**Heard by CVP**

**On:** 4, 5, 8, February and  
26 March 2021

**Before:**

**Employment Judge:** N Walker

**Members:** Ms J Kilgannon  
Mr D Kendall

**Representation**

**Claimant:** Mr A Otchie of Counsel

**Respondent:** Mr S Way of Counsel

## RESERVED JUDGMENT

The Claimants claims fail and are all dismissed.

## REASONS

1. The Claimant, Ms Patience Esimaje, brought a claim for unfair dismissal and disability discrimination against the Respondent arising out of facts related to her dismissal on 2 August 2018.

### Evidence

2. The Claimant gave evidence on her own behalf. For the Respondent, we heard from Mr Mohammed Fahim who was the General Manager at St Pancras International, Mr Yossi Sasson who was a Regional Manager, and Mr Rory Pearce who was Operations Director.

3. We had an agreed bundle of documents. The Claimant supplied an additional email on the first day. The Tribunal was also shown a 20 minute video clip from the CCTV. On the third day the Respondent produced some additional documents which the Tribunal had requested, being a statement from another

employee of the Respondent, Mr Kwame Oteng, and the disciplinary procedure of the Respondent.

## **The Issues**

4. The Claimant suffers from diabetes. The Claimant had claimed unfair dismissal. She also claimed that the Respondent had failed to make reasonable adjustments for her and that she had suffered discrimination arising from her disability. Additionally, she claimed for failure to pay her notice.

5. The issues which had been identified at the Preliminary hearings for case management were as follows:

### *Disability*

5.1 Did the Respondent have actual or constructive knowledge at material times of the Claimant's disability? At the commencement of this hearing the Respondent conceded that it would not dispute this point.

5.2 Did the Respondent fail to make reasonable adjustments for the Claimant? This entailed considering whether the Respondent applied the following provision, criterion or practice (PCP) to the Claimant:

- requiring employees, including the Claimant, to work alone

5.3 Did that PCP put the Claimant at the following disadvantage?

The Claimant was likely to fall asleep/ become unwell/ need assistance due to her disability when left alone

5.4 Were the following reasonable adjustments for the Respondent to have made to avoid the disadvantage?

- not leaving the Claimant alone for longer periods
- allowing the Claimant to take regular breaks

### *Discrimination arising from disability*

5.5 The Claimant contends that the Respondent subjected her to unfavourable treatment by dismissing her for being unwell/ falling asleep/ failing to ask for help.

5.6 The Claimant contends that the dismissal was because of something arising from disability because she became unwell/ fell asleep/ failed to ask for help because of her diabetes.

5.7 The Claimant also contends that she was subjected to unfavourable treatment when the Respondent dismissed her for looking at her mobile telephone.

5.8 The Claimant contends that she was dismissed because of something arising in consequence of disability when she looked at her phone when her phone alarm went off to alert her to take her diabetes medication.

5.9 The Claimant contends that dismissal was not a proportionate means of achieving a legitimate aim, because, amongst other things the Respondent had failed to make reasonable adjustments for the Claimant when it left the Claimant alone for long periods of time and without breaks. The Claimant also relies on her length of service and all the surrounding circumstances.

#### *Unfair dismissal*

5.10 Has the Respondent shown the reason or principal reason for dismissal and that it was a potentially fair reason?

5.11 The Respondent relies on the Claimant's conduct in failing to monitor security screens whilst using her mobile phone and talking to a colleague.

5.12 Did the Respondent have reasonable evidence?

5.13 Did it conduct a reasonable investigation?

5.14 The Claimant says amongst other things that

- The Respondent did not take statements from relevant witnesses for six months;
- The Respondent did not adhere to its own procedure of requiring employees only to look at monitors for 20 minutes at a time;
- The Claimant had been left alone when she should not have been;
- The Claimant had not been suspended immediately from work, indicating that her conduct was not, in fact, viewed as serious.

5.15 Was dismissal a reasonable sanction?

#### *Remedy*

5.16 Did the Claimant cause or contribute to her dismissal? If she did, to what extent should compensation be reduced?

5.17 If the Claimant was dismissed unfairly, what was the likelihood that the Respondent would have dismissed her fairly in any event, following a fair procedure?

#### *Notice pay claim*

5.18 Was the Claimant guilty of gross misconduct such that the Respondent had no further responsibility to pay her contractual notice?

### **The Hearing Procedure**

6 The heading is marked with Code “V” which means that the hearing took place on a remote video platform, to which neither party objected. The hearing was conducted by Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

7. The Claimant was sitting in her solicitors’ office. It was clear that she was being assisted with the technology and that solicitors were helping her locate pages in the bundle, which was electronic. We were satisfied, however, that she was giving evidence unaided and her evidence was not interfered with.

## **Facts**

8. The Claimant was a security guard employed by the Respondent to work at St Pancras International train station which is the departure point for the Eurostar. As that is an international departure point, the security is much the same as for an airport. Passengers have their luggage checked through an Xray machine and have to walk through a security monitor which identifies any metal, or other dangerous objects, explosives, firearms, knives etc. The passengers are body searched if the security monitor indicates any risk. The Claimant was not employed by Eurostar. Eurostar had contracted out the work on the security passenger and baggage checks to Mitie Aviation Security Limited, the Respondent in this case.

### **The Claimant’s Role**

9. The Claimant’s role was to monitor the computer screens beside the baggage Xray machine. She worked at the staff access lane which was used mainly by Eurostar staff going into the restricted area, but was also used on occasion for other passengers, for example disabled passengers. The Claimant had worked for the Respondent since September 2007. She had worked at the St Pancras terminal for a number of years prior to her employment termination. The staff lane was located to the side of the central search area, where the passenger baggage was searched. It was much quieter and less busy than the passenger area. The staff lane was staffed by a four members of security staff. Two members of staff (one male and one female) to carry out “body-searches” if required, and two members of staff to monitor baggage being X-rayed. Of the second pair, one member of the team viewed the Xray scanner equipment, and the other person monitored visits by staff and contractors, checked passes and took phone calls from a desk a few metres away. The baggage pair on the staff access lane would rotate between roles on a basis agreed between them. In contrast, the people doing the equivalent job in the passenger lane central search area had to deal with a constant stream of passengers which amounted to much more intensive work. In that area, there was a rule that no one should be on the Xray machine for more than 20 minutes. Mr Fahim and Mr Sasson both gave evidence that this rule did not apply to the staff access area because it was so much less pressured.

10. The Xray screening equipment was designed to enable the person monitoring it to identify prohibited items such as illegal drugs, sharp items, replica guns and explosives. The Xray screening equipment had built-in software with a checking facility which would regularly insert false images of improper items in order to make sure the person scanning was paying attention. The Claimant informed the Tribunal that she had never failed a test using the false images and this was not disputed by the Respondent.

Code of Conduct

11. There is a section of a policy document in the bundle, which is called Code of Conduct in the Workplace and it includes some relevant provisions.

12. Under the heading “Fitness for work” it states:

*Staff should be fit to work at commencement of their duties. Any staff who are not feeling well during shift and believe that this will impact in their performance must report to supervisors and managers for them to release from their place of duties for further process.*

13. Under the heading “Use of Mobile Phones” it states:

*Use of MOBILE PHONES while on duty is strictly prohibited and must not be used at all. Disciplinary action will be taken if staff found using their mobile phone, either to receive or make a call, texting message, checking time or on social media apps.*

14. Under the heading “Release for Comfort Breaks” it states:

*Should staff need to go to toilet, they should register the request to supervisors to be relieved from their place of duty. If you have not been released by a supervisor and cannot wait further, inform your colleagues near to you and leave your position to go to the toilet. On the way to the toilet inform the supervisor on the desk of your location and reason of leaving. Disciplinary action may be taken against staff if they leave their position without following correct reporting procedure.*

15. Under the heading “Bringing the company into disrepute” it states

*Staff are advised not to engage or commit any activity in the workplace that may bring the company into disrepute. Any staff found engaging may be disciplined as per company policies and procedures.*

16. Although this policy document is headed Eurostar International Standard operating procedure, we understand it is in fact the Respondent’s policies and procedures for working at Eurostar’s premises at St Pancras.

17. In 2013 the Claimant was subject to a disciplinary procedure which led to her dismissal as she was found asleep, while on duty at another location. On appeal she was reinstated. The appeal hearing found that she may have fallen asleep due to her medical condition, which was diabetes. There was a discussion about whether she should return to work at Eurostar as the appeal hearing officer considered it might not always be possible for her to get a break when she needed one, while on night shifts. The appeal officer in his appeal outcome letter recorded that the Claimant was very insistent that she wanted to go back to Eurostar, not working in the central search area. She said she would get a letter from her doctor to confirm she was able to carry out the functions of her role without ill effect. The Claimant submitted a personal certificate dated 3 September 2013, stating “*I can certify that I will be able to perform my duties while at work at all times, days and nights, with my responsibility of taking my medication. I am responsible for this without putting any burden on my employer. I will also perform my duties at staff access as required. A letter from my doctor to support this statement.*” We do not

have the doctor's letter. After that the Claimant did return to St Pancras to work on the staff lane at Eurostar.

#### The Claimant's condition

18. The Claimant's GP wrote a letter on 5 July 2013 recording her medical conditions which included diabetes. According to the occupational health report dated 14 August 2013, which was obtained at that time, the Claimant needed to have regular meals and take her medication. If she did not, there was a risk she could suffer from fatigue, impaired concentration, impaired memory, headaches, dizziness, thirst, shakiness and blurring of vision.

#### The Respondent's efforts to accommodate the Claimant and check up on her condition

19. The Respondent checked up on the welfare of the Claimant on a few occasions between 2013 and 2017, after the incident occurred that led to her dismissal. On 5 September 2014 there was a Welfare Meeting with the Claimant to update the Respondent on the Claimant's condition. The Claimant was allowed to be accompanied by a trade union official. The Claimant confirmed she was a diabetic type 2 and had knee problems. At that meeting she said she took her medication three times a day "at 0800, then 1400 and last one at 19.30". When asked if she was on her post and required prescribed medication to take, what did she do and who will she approach, she replied "*I will approach my supervisor, Night time when I come I am on break I eat and take my medication*". When asked, *if you are on post and not feeling well, what will you do and who you will report*, she replied "*I will inform my team leader to send someone to help me*". When asked, *what help will you need when you are not feeling well*, she replied "*I will feel weakness and that time I need something to eat to balance my sugar level*". When asked, *can you briefly explain ,since you started your days and night shift, do you have any reservation which is impending in your work condition or obstructing you taking your medication*, she replied "*if I have any issue, I will always inform my supervisors and they always support.*"

20. The Claimant says that she sent an email to the Respondent dated 27 March 2017 complaining about working alone. The email was addressed to Mr Gerry Holmes and copied to Mr Fahim. Mr Fahim does not recall getting the email and says that his email address was wrongly spelled. Other emails in the bundle addressed to Mr Fahim have a different spelling of his first name. The Tribunal's attention was drawn to the fact that Mr Fahim's witness statement recorded the spelling of his first name in the same manner as the Claimant had in her effort at emailing him and he had not corrected that when being sworn in to give evidence. We do not need to make a finding on whether Mr Fahim received that email. The significance was only whether Mr Fahim correctly recalled having set up a welfare meeting with the Claimant spontaneously or whether her email prompted it.

21. The email to Mr Holmes said

*I am writing to seek your help in resolving a problem I am experiencing at work. It is a problem that is causing me some concern and that I have been unable to solve without bringing to your attention.*

*I hope in doing so we can deal with the issue quickly and amicably.*

*Sometime last year I was accompanied by a union representative to see general/operational manager and he agreed to review my working arrangement following my concern.*

*I currently work as a alone staff within the staff access 6 days per week which is tiring and demanding for a single individual. Up to now no review of the circumstance has taken place. All I am asking for is a supportive role.*

*I raised this matter informally, but haven't been satisfied with the outcome.*

*I was very upset about this as I have been in this job for over 9 years and the volume of work I had to cover within staff access comes with challenges, very demanding and time consuming. I am therefore asking you to review staff workforce by increasing the number.*

22. It is in fact probable that this letter prompted action on the part of management as Mr Fahim arranged a welfare meeting to take place on 5 July 2017 by a letter dated 28 June 2017. Mr Fahim's recollection was that this was a spontaneous act on his part, although in cross examination he accepted that it was possible that it had been prompted by Mr Holmes, after he received the Claimant's email in March. Whatever led to that meeting, it was an opportunity for the Claimant to raise issues if she was concerned about her working environment. The Claimant was accompanied by her trade union representative Mr McCauley.

23. Despite the email complaint indicating that the Claimant was working alone, the notes of the Welfare Meeting do not contain any reference to the Claimant being concerned about working alone. The Claimant confirmed that she had diabetes, high cholesterol, arthritis in her knees and she was now taking 4 tablets a day as she was visiting the doctors regularly to be on the lower dose rather than the higher dose. She said she was not recovering, rather she was getting worse. She explained that the doctor said her blood sugar was going up and that was not a good sign. She was asked if she had sought any medical attention during the last couple of years at the place of duty at work but she said "*only sometimes when I feel tired as I exhausted I asked them to release me for home but never called any medical attention apart from the microwave egg incident in mess room where medical attention was called*". The Tribunal understand that to be a completely irrelevant matter.

24. When asked how many times the Claimant took her medication during the daytime and night time at work she replied:

*"I take 2 in the morning and two in the night. Like in the morning I like to take at 0800 - 0900 in the morning and in the night time 1900 – 2000".*

25. When asked how she took her medication at work between those hours she replied:

*"when I finish work I always keep my medicine in my bag and I take it when I finish work in the evening after 1900 and for the morning I was taking my break for my breakfast down the medicine. Apart from the diabetes I have other medicines for high blood pressure and high cholesterol and I take at the*

*same time period however for high cholesterol I take it only in the evening time."*

26. Mr Fahim asked her the following question: *"I understand that you take your evening medicine when you finish your shift however the morning medicine when you are on shift between 800 to 900. What would you do to take your medicine between 0800 and 0900 if operation cannot release you for break?"*

27. Her response was *"I go very low as a diabetic person so I approach the person in charge on the floor to give me a break for my breakfast and medicine."*

28. She was then asked *"are the floor supervision accommodating you in the morning to take your break for the breakfast and medicine?"*

29. The answer was *"yes they do"*. When asked: *"if you are not feeling well and on your post position, what will you do and who will you approach?"*; the Claimant replied *"same the floor of supervisors and whoever is in charge at the night time"*

30. When asked to explain what the symptoms would be if she was not feeling well and what help she would need from supervisor or management to support in her recovery, she replied *"I get low by feeling shaky and tired. Sometimes because of my medicine I have to go regularly to toilet immediately. At night it worries me more.."* The Claimant confirmed she was being accommodated to go to the toilet if need be.

31. When asked whether the medical condition could make her unresponsive and unaware of her surroundings the Claimant replied:

*"No, I know how to control my body very fast as I take regular food to energise my body. I take my break 0800, 1200 and 1500 to keep my body energised. At night 1900 to 2000 I take my break after that I take regular drinks and snacks. I take my second break at midnight if I feel I like to eat I eat I take regular teas another drink to keep my body energised."*

32. When asked if she had any reservation which was impending in her work condition or obstructing her taking her medicine the Claimant replied *"no"*. The Claimant had nothing extra to add and nor did her Trade Union representative.

#### Arrangements for the Claimant's medication and breaks

33. The Tribunal were told by Mr Fahim that the Claimant was given set breaks in contrast to other members of staff whose breaks were allocated by the supervisors on the day. She would have three breaks and occasionally an additional break if needed. Any extra breaks she took were not counted as time off the floor. Additionally, the Respondent had arrangements for all staff to be able to leave their post if necessary in the Code of Conduct under the heading "Release for comfort breaks" which we have cited above.

#### Events in December 2017

34. The Tribunal were told that on the morning of 23 December 2017, the Claimant was seen by a member of the Eurostar staff to have her eyes closed. That member of staff gestured to another member of the Eurostar management, Ms Curtis, that they should check the Claimant. Ms Curtis also saw the Claimant



with her eyes closed and called out to her to wake her up. The Eurostar manager then spoke with Ms Biney, a staff member at the Respondent, who emailed the Respondent and her email sent at 14.13 to MSL and SDM says:

*“TDM Vicky approached me around 11:30 and she said “I have just come through staff access and Patience was sleeping. I have to apologise, because I shouted her name and she jolted up.” At about the same time I was called to attend Xray 9 because it stopped working. I excused myself and left but could not talk to her again before the end of my shift. I informed SDM Zeshan and Ade.*

35. That email prompted another email from Zeeshan Qamar, a Security Duty Manager, to Mr Fahim, copied Mr Gerry Holmes sent it the same day at 2:33pm referring to the report which I have described above. The email said *“I have asked TDM Vicky to provide me with her statement and so I will be carrying out investigation. I have also obtained a statement from Nancy Biney which is attached to this email”*.

36. No further action was taken by the Respondent on 23 December. The Tribunal was told this was because Mr Fahim was on his Christmas break. Mr Fahim was back at work on 27 December and he said that was the first opportunity he had to look at the CCTV. We were informed that the CCTV is owned by Network Rail and not by the Respondent or indeed by Eurostar. Mr Fahim had to go to Network Rail to ask to view it. He was concerned at what he saw, and the result was that the Claimant was orally suspended that day with a view to there being an investigation. Her suspension was confirmed in a letter from Mr Fahim dated 29 December 2017. The suspension letter listed out the allegations being investigated which were sleeping on duty, gross negligence, serious breach of security procedures, bringing the company and client into disrepute and serious breach of trust and confidence. Each allegation was accompanied with a sentence explaining it in more detail. The suspension letter proposed an investigatory meeting would take place on 3 January 2018.

37. On 6 January 2018 Mr Andrea Randazzo sent an email to Ms Curtis of Eurostar and Mr Roger Matthew, also of Eurostar, confirming what he had seen on the 23rd December which he described as follows:

*“as I was going through staff access I noticed that Patience was not fully focusing on the Xray machine screens.*

*I asked Vicky (who was on the other side) to check what she was doing.*

*Although I did not see Patience from the front it looked obvious to me that she was not looking at the screens.”*

That email was forwarded to Mr Fahim and he in turn forwarded it to Mr Aderibigbe on 8 January 2018. Mr Aderibigbe carried out the Respondent’s investigation.

38. It appears that soon after being suspended, before the planned investigatory interview, the Claimant became unwell and was put on sick leave. The suspension was paused while she was ill so that she was put onto sick pay and treated in accordance with the normal sickness procedure. It did not take effect again until the Claimant had recovered from that absence and was fit to work. The

Respondent did not attempt to carry on the investigation by interviewing other staff at that stage.

#### Welfare Meeting on 27 March 2018

39. By a letter dated 8 March 2018, the Claimant was asked to attend a further Welfare meeting with Mr Fahim. The initial date for that meeting was moved to accommodate the Claimant's trade union representative, who attended with her on 27 March 2018. The Claimant suggested at that meeting she be sent to Occupational Health. She was asked about her current conditions and she referred to depression and arthritis pain in her right hand. She was asked about her medication and she confirmed she was on antidepressant tablets. She was asked what support could be provided to support her recovery and she said "*I don't know what support can be given. My GP has advised me that company should send me to occupational health*". She was asked whether she was signed off by the GP and when it was expiring, and she said that it expired on 25 March. She said she did not have any more sick notes and would be back on suspension from 26 March. Mr Fahim did not arrange for the Claimant to see Occupational Health.

40. On 5 April 2018, Mr Fahim wrote to the Claimant recording the meeting. The letter set out a table detailing the GP notes that had been produced during the Claimant's sickness. which included:

- 29 December 2017 covering the period 29 December 2017 to 12 January 2018 - low mood
- 12 January 2018 covering the period 12 January 2018 to 28 January 2018 - low mood
- February 2018 covering the period 29 January 2018 to 28 February 2018 - low mood
- 5 March 2018 covering the period from 1 March 2018 to 25 March 2018 - depression, diabetes, osteoarthritis in hands and legs.

41. The letter continued that, as the Claimant had not been signed off by the GP after the last sickness note expired on the 25th of March 2018, her sick pay would revert back to suspension pay.

42. The letter then referred to the Claimant's proposals during the meeting which were that she stated she was taking anti-depressant tablets and that she wanted to be referred to Occupational Health as referred to by her GP. The letter referred to the proposals agreed after the welfare meeting on 5 September 2014 to support the Claimant's medical condition which were:

- *If medicines are required at times when you are on duty, you will approach duty supervisor informing you need to go immediately and take your medicines.*
- *If you are feeling unwell and this is affecting your work, you must need to inform duty supervisor for you to be released from your post position until you recover.*
- *You will provide GP visits and physio visit details to the management regularly.*
- *You are working now 3 days and 3 nights and 3 off shift pattern at staff access, this shift pattern required by you for six months. After six months meeting will take place to review your shift pattern.*

43. The letter continued

*A follow up welfare meeting was arranged on 5 July 2017 to discuss if you have any issues at work that required attention or need further support at work to support your medical condition. You have stated that you are satisfied the way you being accommodated by shift supervisor to allocate you time to eat breakfast, take medicine and release for comfort breaks. You further stated that nothing is obstructing in work condition for you to take your medicine.*

*Since 5 July 2017 there is no recollection of you approaching MITIE management and asking for any further support and seems that you were satisfied the support you receiving at work.*

*During the meeting on 27 March 2018 on a question of what additional support required at work, you have not provided any details and replied that you will let us know what support required upon your return to work.*

44. The letter concluded by referring to the Employee Assistance programme and gave the contact details for it. The Claimant's request to go to Occupational Health was in effect discounted.

Investigation resumed

45. The Claimant was also sent a further letter dated 28 March 2018 informing her about the allegations of gross misconduct which had led to her suspension on 27 December 2017 (being exactly what was set out in the first suspension letter) and that she was on suspension pay from 26 March as her sick note had expired. The Claimant was invited to an investigatory meeting on 1 April 2018. The investigation meeting had to be rearranged to make sure that she was able to be accompanied by her union representative.

46. Eventually, the investigation meeting took place on 18 April 2018 at 4 pm. The allegations were repeated, and the Claimant was then asked a series of questions. The people present at the time were Mr Aderibigbe as the investigating officer, the Claimant, her trade union representative and another individual as a note taker. The Claimant signed off the meeting record as accurate.

47. The notes show that the Claimant was asked about the arrangements for who to report if she was not feeling well at work and she responded that she normally told the manager on duty. She was asked who she had to contact if she required a comfort break. She said she normally called from the staff access phone to the desk for a comfort break. The Claimant was asked who she had to contact if she needed time off from her position due to an emergency situation and she replied she normally called the Security Duty Manager when available.

48. The Claimant was asked about her main area of duties at the Eurostar at St. Pancras and said "staff only", which we understand mean that she only ever worked in the staff access lane. She was asked to explain the duties at the staff access lane, and she explained they involved working on the Xray screen, administrative work, telephone (which could be very busy sometimes) and tending to the retail shutter and also sometimes she said they do contact staff and manage up patrols and at night we do full passenger screening. The Claimant was asked

to explain the basic duties of the Xray screening reader, and she said she had to log on with her name and then whenever there are contractors or the passenger, she had to screen the items and reject the bag if necessary. She was asked if she knew the importance of focusing on the Xray screen and monitoring all items passing through and using the enhancement functions on the X Ray images at all times and she replied she did understand.

49. The Claimant was asked about the 23rd December and the allegation was put to her that on that day at about 11.23 she was found to be sleeping and unresponsive and unaware of her surroundings while carrying out Xray duties on the Xray in the staff access lane. The Claimant denied it and said it was not true as she was not aware of sleeping or being unresponsive. She said *"it's may be due to my disability. As I was not well and there was no Security Duty Manager available to contact as nobody was picking up the phone and I was left alone for two hours on that Machine"*.

50. The Claimant was asked if she reported to any supervisor on the day that she was not well and she said she had tried to call everybody, but no one was available as it was a busy time. The witness statements were then read out to her and her trade union representative. She was then asked if she remembered Ms Curtis calling her to seek her attention in alerting her on the 23rd December at around 11:25 while she was on Xray screening duties. She replied, yes. It was then put to her that according to the statement from Ms Curtis, she was at staff access lane when she noticed the Claimant on the Xray machine with her eyes closed and then she called her name to wake her up. The Claimant was asked if she had anything to add and said she did not have anything to add. She was then asked about Mr Randazzo, who was also present in the staff access body search area and who, according to his statement, noticed that while the Claimant was on Xray screening, she was not fully focusing on the Xray screening. She was asked if she had anything to add. The Claimant said she was really surprised as he came to her and tapped her on her back, and he said to be careful of Ms Curtis. The Claimant was asked if she thought Mr Randazzo would make up a false statement if he did not see the incident. The Claimant said she was really surprised as he came up tapped her on her back and he said be careful of Ms Curtis because she told him about what happened.

51. Mr Aderibigbe then asked about the Claimant's views on staff using personal mobile phones while carrying out Xray screening duties and while the items processing through the machine. The Claimant said:

*"You stop the belt if it is important and ask for cover and answer the phone or wait until the break time as I have a terminally ill sister which unfortunately passed away three weeks ago and also put the alarm on my phone on vibration to help me take my medication"*.

52. Mr Aderibigbe said it was alleged that the Claimant was found using her personal mobile phone while she was carrying out Xray duties on 23 December between 11:28 and 11:35 and whether she had any explanation for this. The Claimant said:

*"I did not make any phone call as I was left alone for some time and I was desperate to leave staff access and also I was looking for the contact number to contact someone as I was not well that day as I was holding the phone to contact anyone"*.

53. The Claimant was asked whether she was focusing on her phone between 11:28 and 11:35. The Claimant said she couldn't remember until she saw the CCTV video. She said she was anxious and desperate to contact for someone to relieve her. She was asked if she knew that use of a mobile phone while on duty was strictly prohibited and that phones must not be used at all to check the time or for any other reason at all. The Claimant confirmed she did know. She was then told that it was alleged she was observed on CCTV not monitoring screening items and not using enhancement functions from the Xray screening on 23rd December between 11:28 and 11:35. She was asked if she had any explanation for this. The Claimant said *"I cannot remember. But not only you don't use enhancements but you are focusing"*.

54. The Claimant was told CCTV footage was available and it was then played for both the Claimant and her union representative to view and after they had done so the meeting was adjourned for a few minutes and then recommenced, at which point the Claimant was asked whether she had fallen asleep or become unresponsive or unaware of her surroundings at any time on while on duty that morning while covering the staff access Xray duties. The Claimant said *"no"*. It was pointed out that according to the CCTV footage they could see the Xray conveyor belt was stopped at 11.23, the trays were not moving but it seemed the Claimant did not notice that the machine belt had stopped. She was asked whether she had an explanation for this. The Claimant said *"it happens sometimes that the machine will just stopped and someone have to alert you to start or just discovered it yourself to start the machine"*.

55. There was a question about the CCTV footage in which Mr Aderibigbe said *"According to CCTV footage I can see you are not concentrating on the Xray screening and items are passing through x-ray conveyor belt while you were either on your mobile phone and were also seen talking to your colleague rather than focusing on x-ray screening duties"*. The Claimant was asked if she had an explanation for this. The Claimant said *"That is not true as I was focusing on the x-ray screen because we listen ears and watch with my eyes and there was not influx of passengers as I could easily maintain my view and focus"*.

56. Mr Aderibigbe said the CCTV footage confirmed that the Claimant was using her personal mobile phone while on Xray duties specifically between 11:26 to 11:29 and the staff access Xray and the bags were processing during this time. The Claimant was asked if she had an explanation for this. The Claimant said *"Due to my disability I was poorly on that day and was left to work for hours to work on my own at the staff access"*.

57. Mr Aderibigbe said *"I noticed on the CCTV that you had a colleague with you at the staff access"*. The Claimant said *"At the time Vicky came to staff access I was alone"*. It was then pointed out that on 23rd December it was alleged she had failed to comply with screen reading procedures and allowed staff items to process through the x-ray screening into the restricted saying without having the Xray images and this could be seen on the CCTV. She was asked if she had any explanation. The Claimant said *"Because I was watching everything on the X-ray as I was sure what was passing through"*.

58. The Claimant continued to deny that she was doing anything other than being focused on her job. The Claimant then said that the situation was different to what had happened. She was asked what part of CCTV footage she was challenging

on this allegation and she said the whole scenario was different to the allegation. The Claimant was asked if she'd like to see the CCTV again but said she had seen it but would like to have a copy of it. The Claimant was then told she could make a request, but it was a confidential document. The Claimant was reminded about the risk of a potential explosive device passing through the Xray machine and whether she understood the seriousness of the consequences. She replied "*I understand it but I was focused on the x-ray screen as I was doing my job correctly so what you have on that video is not correct*".

59. When asked if there was something she would like to add, the Claimant said she was complaining of breach of duty of care for her health and safety and leaving her at staff access alone for more than two hours. She said she should only have been left for 20 minutes. She referred to the Department for Transport (DfT) rules and "Ionscan" regulations both providing for a maximum of 20 minutes on the Xray screen. She then talked about having verbally complained to both Mr Fahim and Mr Holmes for months. She complained that if her actions were so serious, she should have been stopped from working immediately and instead Mr Fahim called her on the 27th December and suspended her. She said this had made her feel depressed to the point that she could not go out for months.

60. The Claimant's trade union representative was asked if he wanted to add anything. He said that the incident that had happened was not clear because after a brief discussion with a manager, the Claimant was allowed to work for several days before she was suspended at all. The Claimant wanted to draw management's attention again to the working practices of that position and complain about problems and only manning with one member of staff. The trade union representative also complained about symptoms of the Claimant's disability.

#### Further investigations

61. The Respondent carried out a number of other investigation meetings following the Claimant's investigation meeting on 18 April 2018.

62. On the 20th April 2018 Mr Aderibigbe interviewed Ms Biney, a security officer. She confirmed she was part of the supervision team on the early shift on 23 December and was on duty when the incident occurred around 11:30 am at the staff access lane. She said she became aware of the incident when Ms Curtis informed her. She said Ms Curtis told her she had just come through the staff access lane and saw the Claimant sleeping. She said she had to apologise to her because she called her name and she jolted up. They were then interrupted by a member of staff. Ms Biney confirmed she had not talked to the Claimant about the matter because she had been called away to deal with an Xray fault on a machine. Later she went back twice to talk to the Claimant but on each occasion she was not available, or was on a break. When asked if the Claimant had approached her before the incident or complained that she was not feeling well at any time she said "*no*". When asked if the Claimant had approached her during the shift before the incident asking to be relieved from her post of duties she also said "*no*". When asked if she knew if the Claimant complained to any other of the supervision team that she needed assistance she replied "*Not that I am aware of*". When asked if she noticed the staff access down manned and the Claimant left alone to deal with staff access matters on the day of the incident anytime, she replied "*No. She Patience was there the whole time with K Oteng*".

63. Mr Aderibigbe then interviewed Mr Steve Mails, a security officer, on 23 April 2018. Mr Mails confirmed that he was part of the supervision team on the early shift on 23 December 2017 and was on duty when the incident occurred around 11:30 am at staff access. Mr Mails was asked if he was aware of the incident. He was asked how he came to know about the incident. He confirmed he was aware, and that Ms Biney informed him of the incident. It is clear from Mr Mail's responses that the information he had was given to him by Ms Biney reporting what she had been told by Ms Curtis. However, Mr Mails said that he had told Ms Biney to report the matter to security Duty Manager. He also confirmed that the Claimant had not approached him during the shift to complain that she was not feeling well, and she had not asked him to be relieved from her post. Additionally, he confirmed that he was not aware that that the Claimant had complained to any of the supervision team on that day that she needed assistance. When asked if he had down manned staff access and left the Claimant alone to deal with staff access matters on the day of the incident he replied "no". When asked if the staff access was down manned at any time on 23 December 2017, he said he did not remember.

64. On 23rd April 2018 Mr Aderibigbe interviewed Devi Thapa, security officer who could be seen on the CCTV to be on the body search position on the staff access lane covering the metal detector on 23 December. Devi Thapa could not remember what time the shift started that day and said the Claimant had not approached him at any time during her shift to complain she was not feeling well that day. He also denied that the Claimant had asked to be relieved of her duties for a comfort break or to make an urgent phone call that day. When asked if the Claimant approached him to seek the attention of a supervisor for her at any time that day while he was on body search duties at the staff access archway metal detector, he replied "*No. She never did at any day*".

65. Mr Aderibigbe then interviewed Mr Bienvenu Kameni, a security officer, on 23rd April 2018 who could be seen on the CCTV footage to be on body search position on the staff access lane covering the metal detector on 23 December. Mr Kameni was asked the same type of questions as Mr Thapa and Mr Kameni replied that he was not aware of anything. He then asked which shift he was on and was told Mr Kameni was on the early shift that day. He was asked whether the Claimant approached him during her shift to complain she was not feeling well, and he replied "no". When asked if the Claimant approached him saying she needed to be relieved from her post of duties for a comfort break or to make an urgent phone call, he replied "no". When asked if the Claimant approached him to seek the attention of the supervisor for her at any time on the 23rd of December while he was on body search duties at the staff access archway metal detector, he replied "no".

66. On 23 April 2018 Mr Aderibigbe wrote a further letter to the Claimant inviting her to a second investigatory meeting to be held on 27 April 2018. It seems that meeting did not take place and further letters were written dated 26 April 2018 and 1 June 2018 in more or less identical terms inviting the Claimant to a second investigatory meeting.

67. On 12 June 2018 there was a second investigation meeting which was conducted by Mr Aderibigbe and was attended by the Claimant and her trade union representative as well as a note taker. After briefly discussing the reasons why the meeting had had to be rescheduled Mr Aderibigbe explained that he had investigated the supervision team and other members working in the close vicinity of the staff access area who could be seen on CCTV working on the 23rd

December and taken their statements. He had the CCTV footage for the Claimant to view during the meeting and also the welfare notes to discuss.

68. Mr Aderibigbe reminded the Claimant that she had stated she did not make any phone call as she was left alone for some time and was desperate to leave staff access and also was looking for the contact number to contact someone as she was not well that day as she was holding the phone to contact anyone. He then explained that the manning sheet confirmed that security officer Mr Kwame Oteng was rostered as break relief on that day. He referred to another record called the DOR for staff access which had been checked and showed that security officer Oteng made entries at 10:18 and another one at 11:15 concerning officers calling sick for their shift. Mr Aderibigbe said this suggested that the Claimant was not left alone at staff access. The DOR and manning sheet were shown to the Claimant.

69. The Claimant replied that she did not know where Mr Oteng went, but he was not replaced. It was then put her that according to the footage Mr Aderibigbe could confirm that Mr Oteng was at staff access at 11.26 am and it looked like the Claimant was not left there alone. The Claimant rejected that and said they did not use the DOR and she was left alone. She said there was a period when she was alone before he reappeared at 11.26 as could be seen on the CCTV. When asked which if she could confirm what time he went on a break she said she didn't remember but Mr Oteng told her he was sent on a break. Mr Aderibigbe replied that according to the break sheet Mr Oteng went on a break at 12:00 o'clock and the break sheet was shown to the Claimant. The Tribunal was not provided with the DOR sheet or the break sheet or the manning sheet, so we are not able to verify these entries.

70. The Claimant referred to the CCTV which started at 11.19. Mr Oteng cannot be seen at the start. She then said she was left alone from 11:20 and till 11:26. Mr Aderibigbe said he had a statement from the Security Duty Manager, Mr Qamar, and supervision team Ms Biney and Mr Mails and they all confirmed that the Claimant did not approach them saying she was unwell on that day. The Claimant said she was not feeling well and nobody would pick up the phone. Everybody was busy and she couldn't talk to anybody. Mr Aderibigbe said according to the CCTV footage at 11:23 two officers can be seen, male and female, on body search at staff access covering the arch metal detector. She was asked if she approached any of the officers at the staff access arch metal detector to seek assistance of the supervision team. The Claimant said she didn't seek assistance because she was left there alone and this situation happens for years. She said that if she asks people they will tell her they can't leave their position and they are not part of staff access. When asked if she told anybody that she was not well she replied "*no / only told K Oteng*". The body search statement was read out to the Claimant and she was asked if there was any reason why she did not inform one of the officers on the body searcher at the staff access arch metal detected to call any of the supervision team for her. The Claimant said again that this situation happens for years and she was left alone and if she asked people they would tell her they couldn't leave their position and they're not part of staff access. Mr Aderibigbe then referred the Claimant to the welfare meeting record dated 5th July 2017 in which she confirmed that she knew who to contact if she was not feeling well or needed time to take her medication. She was asked why she had not contacted any of the supervision team including the manager on that date. The Claimant replied she had answered the question already. The Claimant was then asked by Mr Aderibigbe whether she had reported to any of the officers at the staff



access arch metal detector on that day that she was not well needed assistance and she replied "*no only to Kwame Oteng*".

71. The Claimant was referred to the previous investigation meeting in which she had stated she couldn't remember until she saw the CCTV video and that she was anxious and desperate to contact for someone to relieve her. It was then put to the Claimant that she was seen on the CCTV talking to security officer Oteng and she was asked why did she not leave the position to relieve herself while security officer Oteng was that staff access if she was that desperate and unwell. The Claimant replied because of what was going on. She said "*Vicky was shouting at me. I was not sleeping I don't know what was going on and I was confused. Why should I leave my position when staff access was for two people at all time? I have to forfeit my medication*". Mr Aderibigbe asked the Claimant if she could remember what Vicky said to her and she said "*Vicky was shouting that I was sleeping but I wasn't sleeping. I don't know what was going on*".

72. Mr Aderibigbe referred the Claimant to the investigation meeting on 18th April when the Claimant had said "*Due to my disability, I was poorly on that day and was left to work for hours to work on my own at the staff access*". The Claimant was asked to explain what disability she had and how that may affect her work and as per CCTV she was not alone. The Claimant replied that the management were aware of the situation due to an incident at Temple Mills but she said that it was not dealt properly. She referred to her having been sent for assessment by occupational health and that management were aware. Mr Aderibigbe referred the Claimant to the statements he had taken. The Claimant said she needed to take her medication and had her alarm on. She wasn't making any phone calls. She offered to bring the itemised phone bill to show that.

#### The Claimant's grievance

73. On 8 July 2018 the Claimant wrote to Mr Pearce, Operations Director for Transport Security complaining about the fact she was not comfortable with the member of staff handling her disciplinary case. She asked for other staff in a senior position to look at this case. She said that she would not get justice due to preconceived ideas in the decision making. Mr Pearce enquired who was dealing with the matter but by that stage the investigation was over the and the person allocated to conduct the disciplinary hearing was another officer entirely, so he took no action.

#### Disciplinary hearing

74. By a letter dated 12 July 2018 the Claimant was invited to a disciplinary hearing. The letter was sent by Mr Yosi Sasson, a Regional Manager, and the disciplinary hearing was to take place on 27 July 2018. The allegations that had been raised at the investigation meetings were set out again. They were:

**Sleeping on duty:** on 23 December 2017 at approximately 11:23 you were found sleeping, unresponsive and unaware of your surroundings during your position at x-ray screening duties on staff access lane which witnessed by a Eurostar Terminal Duty Manager.

**Gross negligence** - specifically that your actions between 11:23 and 11:35 on 23 December 2017 could have resulted in a serious breach of security at the station,

where you failed to monitor x-ray screen items passing through while you were found operating your personal mobile.

**Serious breach of site security procedures:** You failed to carry out your x-ray screening duties in between 11:23 -11:35 on 23rd December 2017. You were observed not monitoring the screening items and not using enhancement functions on the x-ray screen at your post. This could have resulted in a prohibited article to enter into restricted zone undetected and could have caused potential harm and damage to lives and Eurostar infrastructure.

**Bringing the company and client into disrepute** - Your actions on 23rd December 2017 in between 11:23 to 11:35 was in view of client staff and contractors, which could damage Eurostar and MITIE's reputation.

**Serious breach of trust and confidence** - Specifically the company has lost confidence in your ability to carry out your primary role sufficiently in relation to the above.

75. The Claimant was sent the notes of the investigation meetings and the statements from each of the persons who had been interviewed being: Ms Curtis, Mr Randazzo, Mr Mails, Ms Biney, Mr Qamar, and security officers Mr Kameni, Mr Thapa and Mr Oteng. She was also provided with her own investigation meeting notes dated 18 April and 12 June 2018, the Code of Conduct in the workplace, pages 78-85, and the welfare meeting notes dated 27 March 2018 and 5 July 2017. She was told the CCTV would be available for her to view during the meeting.

76. The Claimant was told that Mr Sasson would be holding the meeting and that he would be accompanied by an admin manager, who would be taking notes. The Claimant was reminded that she could, if she wished, be accompanied by a work colleague or trade union official.

77. The disciplinary meeting took place on 27 June 2018. The Claimant asked what was happening to her grievance. Mr Sasson replied that he was not aware of it and would check the position and reply in writing. The Claimant was asked if she was happy to continue now to which she replied "yes". Mr Sasson raised the first allegation of sleeping on duty. The witness evidence from Ms Curtis and from Mr Randazzo was put to the Claimant and Mr Sasson referred her to the CTV. The Claimant insisted she was focusing on the screen and Mr Sasson said "*just to summarise if you are saying that the evidence from the client is wrong and that you were focusing on the screen*" to which the Claimant replied "yes".

78. Mr Sasson then put the second allegation to the Claimant and read it out. He said he had looked at the CCTV and the Claimant had a phone in front of her between 11:26:40 seconds to 11:29:10 seconds which was two and half minutes doing stuff on the phone. During that time there were about 3 trays going through the machine and she was not checking the Xray. The Claimant insisted she was checking the Xray and did not receive or make any phone calls. She was asked how she could focus on the phone and Xray machine at the same time and the Claimant's response was to complain that she had been left for hours when the policy said it should be 20 minutes. There was then a discussion about the Claimant's break and she thought it took place at 8:05 am. Mr Sasson stated that meant she was there for two hours. The Claimant said there was more than two hours said she had complained many times for years that she was left far too long on her own.

79. Mr Sasson asked again about the Claimant being on the phone for 2 1/2 minutes and he asked how she could focus on the Xray machine at the same time. The Claimant said *"I was concentrating I was not calling I was checking my phone because it was vibrating for medication"* to which Mr Sasson said that he could see from the CCTV when the Claimant put her phone in her pocket and again, he asked how she could concentrate on the images on the screen while holding the phone. The Claimant replied *"I was concentrating as I was not making or receiving calls and I could concentrate. I was holding the phone but looking at screen"*.

80. Mr Sasson then addressed the next allegation of bringing the company and client into disrepute. The Claimant insisted that Mr Randazzo and Ms Curtis were saying different things to which Mr Sasson said that he did not think their evidence was inconsistent, but he had noticed another matter being the Claimant talking to other people and not focussing on the screen.

81. Mr Sasson raised the allegation of serious breach of site security procedures. He detailed the charge saying: *"You failed to carry out your x-ray screening duties in between 11:23-11:35 on 23 December 2017. You were observed not monitoring the screening items and not using enhancement functions on the x-ray screen at your post. This could have resulted in a prohibited article to enter into restricted zone undetected and could have caused potential harm and damage to lives and Eurostar infrastructure"*. The Claimant was invited to look at the CCTV again. Her response was *"Yes after watching. I was not looking at the paper I was looking at the screen"*. Mr Sasson put another allegation to the Claimant about a serious breach of trust and confidence and specifically the question of the company losing confidence in her ability to carry out her primary role sufficiently in relation to the above. The Claimant was asked if she wanted to see the timesheet when Mr Oteng went for a break. She said she did. There was then a discussion about the Occupational Health report ("OH"). When asked what the issue was with OH the Claimant said *"They didn't do any adjustment for me and the report said that I needed adjustment. OH wrote that they should deal with disability act and they didn't do anything for me"*. She said she told them many times that staying in staff access for so long was not good for her, to which Mr Sasson replied *"so you are claiming that the fact that the client saw you with your eyes closed and another client saw you not focusing on the screen is because of your disability"*? The Claimant said that she was saying that Mitie should take responsibility for that. Mr Sasson said he had seen the minutes from the Welfare Meeting and wanted to know if the Claimant was saying her disability was connected to this. The Claimant said her diabetes was connected and she had written many letters to Mr Fahim and Mr Holmes. Finally, when the Claimant was asked if she had anything to add she said that she believed Mr Fahim just wanted to get rid of her. The Claimant's trade union officer was given an opportunity to make comments which he did, and the meeting ended.

## Dismissal

82. By a letter dated 2 August 2018 Mr Sasson wrote to the Claimant explaining his decision following the disciplinary meeting which was to terminate her employment. He quoted the charges which have been detailed above and summarised the explanations given by the Claimant, referring to her denial that she was asleep and insistence that she was focusing on the screen, her admission that she had her mobile phone with her but that she did not make any calls and

her explanation that she was checking the phone because it was vibrating for a medication reminder.

83. He referred to her challenging the client statements about her eyes being shut and her not being focused on the screen because she did not consider the statements provided by the two people, Ms Curtis and Mr Randazzo corresponded. He referred to the fact the Claimant complained about being at staff access duties over 2 hours and her reference to having complained many times that she was left there for too long. He referred to her saying the Eurostar rules said she shouldn't be there for more than 20 minutes and that she had complained about this. He also summarised her explanation that she did not call for others to relieve her as every time she had called their response was that they would not assist. He also referred to her having stated that she had been left for a long time on the staff access duties which was not good for her due to her disability and her claim that management did not make any adjustments for her. He then summarised his findings.

84. Mr Sasson said he had found that the Claimant had confirmed that she got tired while on duty and he assured her that consideration was given to her condition during the decision making process. He accepted that her condition could cause fatigue and sleepiness while on duty and therefore he did not uphold the first allegation about the Claimant sleeping while on duty.

85. Mr Sasson rejected the Claimant's suggestion that the Respondent company failed to support her disability and said that he found the company had done so and, as part of the reasonable adjustments implemented, provided her with clear instructions on how to escalate a problem when she was feeling unwell, thereby allowing her break until she recovered. He referred to the welfare outcome letter dated 12 September 2014 and the welfare meeting on 5 July 2017 where the Claimant stated she knew how to who to approach in such circumstances.

86. Mr Sasson stated that the use of the personal mobile phone in the restricted area was not part of the reasonable adjustments and he had also found there was a phone in the staff access area which the Claimant could have used for internal and external communications which was located on the desk near her position for screening duties. He said she could have stopped the belt in an emergency to access the phone.

87. He had found that while the Claimant was aware of the correct escalating procedure, she did not approach anyone to report she was feeling unwell. He said the management had questioned all of the witnesses working with her on the day including the duty manager and two supervisors and none confirmed that she reported feeling unwell or that she needed to be relieved of her duties. During her investigation meeting she stated she did inform Mr Oteng she was feeling unwell. However, Mr Oteng stated he did not remember this.

88. He also referred to investigating the required time in the staff access area in view of the Claimant's reference to Eurostar staff being required to be there for 20 minutes screening only and said the 20 minute screen rule does not apply to the staff access lane and this had been the case for the last 10 years on the contract. He explained that the 20 minute screening rule was only applicable to the passenger lanes. He also referred to the fact the Claimant had not raised any concerns at the welfare meeting on 28 June 2017 about the support given to her in the workplace.

89. In conclusion, he decided that summary dismissal was appropriate in the circumstances. The reasons he gave for this were as follows.

- *You were using your personal mobile phone in the area where mobile phone use is prohibited: and during xray screening duty where it is critical that an officer pays full attention to the screen to prevent a prohibited item, such as a gun or explosive, access the Eurostar station. You claimed you were checking your phone because it was vibrating for medication. During your investigation meeting on 18 April 2018 you explained the reason for having your mobile phone was that you were looking for a contact number to contact someone as you are not well that day and you were holding the phone to contact someone. The CCTV footage showed you with your head down to your mobile, flickering your fingers over the phone and not paying attention to the screening duties while the trays were passing through xray screening machine.*
- *You were observed on the CCTV footage, chatting to your colleague while another tray was passing through the screening machine. This, in addition to the above, confirms that you failed to pay attention while on screening duties, which constitutes gross negligence.*
- *While you are aware of the correct security procedures, you did not stop the belt to prevent the bags running. This would have prevented the risk to yourself, the client and the public.*
- *You are an experienced security officer and as such were fully aware of the correct security procedures, the severe level of national terrorism threat, and the importance of screening duties to prevent a prohibited item being brought on site. You were aware of the consequences should a gun or explosive pass through while you were not paying attention.*
- *Your actions on 23 December 2017 endangered the lives and wellbeing of the passengers, staff and infrastructure at the Eurostar station.*
- *Your actions on 23 December 2017 could have damaged Eurostar and MITIE's reputation and could have incurred financial penalties.*
- *Due to the actions outlined above, the company has lost trust and confidence in your ability to carry out your primary role as security officer.*

90. The outcome of the Claimant's grievance was also referred to in this letter as the Claimant had asked about it in the course of the disciplinary hearing. Mr Sasson recorded that he had investigated the grounds and found that the Claimant requested a different manager to deal with the disciplinary case as she felt that Mr Fahim would not be an appropriate manager to deal with it. This request had been accommodated to ensure the case was dealt with impartially and fairly by appointing Mr Sasson as the disciplinary manager as he had no involvement in her case.

## Appeal

91. The Claimant was notified of her right of appeal and did appeal. We do not have any details of her grounds of appeal, although the Respondent did write to

her asking her to submit the grounds by Monday 3 September 2018. It is not clear if she ever did put forward any specific grounds of appeal as no grounds as such were referred to at the appeal hearing.

92. The appeal hearing took place on 14 September 2018 and was conducted by Mr Rory Pearce, operations director. The Claimant attended with her trade union representative and a note taker. In the course of the appeal hearing the CCTV was played again. Mr Pearce explained that as he understood the position there was no question as to whether the Claimant was on her phone while screening bags. The two things that came up in the investigation were first that she had the alarm on for medication and secondly that she was trying to contact someone for help. There was a discussion about what the Claimant had said to Mr Oteng. She said she had told him she wasn't well before he went on his break. She was asked why she didn't tell anyone else as there were many people around and Mr Oteng hadn't done anything to help. She did not answer that question. Instead, her trade union representative talked about Claimant being left alone for a long time and how she was a disabled person so reasonable adjustments should be made for her. Her trade union representative said he believed this matter was misconduct, but not gross misconduct. He argued that the Claimant should not have been dismissed. The Claimant made a statement stating she thought she had been discriminated against because of her disability. Her explanation was that according to the interview with Mr Oteng in June, the manager had told him that on the CCTV he was seen talking to her in December but nothing happened to Mr Oteng and she was dismissed so she was discriminated against. She referred to Ms Curtis shouting at her and said that affected her so she was on anti-depressant medication today. She talked about the length of time she had worked with the Respondent and how she had never failed the false image tests. She complained about being on the screen for hours and she thought she shouldn't have been on for so long a period. She again offered her telephone bill so that the Respondent could see she hadn't made any phone calls at the relevant time.

93. Mr Pearce sent an appeal outcome letter on 21 September 2018 in which he explained his decision to reject the appeal. He identified two appeal grounds that were explained to him being firstly that the Claimant was not asleep, and secondly that she did not use her mobile phone to make a call or send a text message. He pointed out that the dismissing manager Mr Sasson had made it quite clear that he did not uphold the charge of falling asleep and so it was no longer relevant.

94. Regarding the dismissal for using her mobile phone while operating Xray equipment and not looking at the screen, he recorded the Claimant's response of advising him that her phone alarm was for medication and she could not switch it off and in addition her saying that she was trying to make a call to someone as she felt unwell. He referred to this CCTV which they viewed where the Claimant could clearly be seen looking at her phone and flickering the screen for some time while trays were coming through the Xray. He said it was his opinion that the Claimant was neglecting her duty. His outcome letter then recorded the Claimant requesting him to consider three points which he had taken time to investigate. The first was why no reasonable adjustments were made after her Occupational Health report. In the light of the minutes of the welfare meeting held on 5 July 2017 which the Claimant had signed, he considered that reasonable adjustments had been made to accommodate her condition. He explained that the minutes stated that the Claimant was happy with the adjustments being made, happy with the supervisors releasing her when requested and happy with the procedure put in place should she feel unwell.

95. The letter recorded another matter raised by the Claimant being why it took three days to suspend her from duty. He explained that it was due to the timing of the initial reports. The management office was closed until 26 December. He had been advised by Mr Fahim that he could not make a decision to suspend the Claimant based on initial reports and needed to investigate further, for example looking at the CCTV footage to reconcile the statements and to see if the luggage was processed in the restricted zone without the Claimant viewing the X-ray screen. As Mr Fahim came back to work on 27 December after the Christmas holidays, the decision was made that same day after he had viewed the CCTV.

96. The third matter raised by the Claimant was why her grievance was not dealt with. Mr Pearce referred her to a letter dated 2 August sent to her by the regional manager, Mr Sasson, where he explained that he had investigated her grievance and found that she had requested that Mr Fahim did not deal with her disciplinary meeting, which was duly actioned. He did not believe there was anything further to action in relation to the grievance.

97. Having considered all of those matters he explained that he had upheld the decision to dismiss, and he added *"I believe that at a time of heightened security for the UK you neglected your duty by looking at your mobile phone whilst operating X-ray equipment, and not completing the search ratio"*.

#### Credibility

98. The Tribunal were asked to take the view that the Claimant was a credible witness and this was an important issue in relation to her claim. We did spend time considering the Claimant's credibility and it was our conclusion that, on occasions, the Claimant was an unreliable witness.

99. We found the Claimant's evidence troubling when she said that the reason for her having difficulty was that she had been left alone on the staff access lane. While there was no sign of Mr Oteng when the CCTV starts, he did return at approximately 11:26:36 which was more or less exactly when the Claimant got her phone out of her pocket. While the Claimant was looking at her phone, Mr Oteng was at the desk nearby. In relation to the Claimant's argument that she was checking her phone as she needed to call for assistance, she did not need to do that. Mr Oteng was there to ask for help.

100. The Claimant informed us that she took her medication at four times during the day. The times she gave us when she took her medication were 8.00 a.m., 11.00 a.m., 8 p.m. and 10 p.m. According to her evidence in response to our questions, she would set the vibration alarm on her mobile phone to go off about 15 minutes before she needed to take her medication. She said that if she needed her medication at 8.00 a.m., she would set the alarm for 7.45 and when it went off, she would try to stop it and then tell her colleague that she needed to take her medication. She would then go and take it. She also said she would use the office phone to ask if someone could cover for her. On that basis, if she needed her medication at 11:00 a.m., the alarm would have gone off at 10:45 a.m. That was nowhere near the time that she was seen looking at her phone and that explanation made no sense. It is also noteworthy that the actions which we can see on the CCTV are inconsistent with someone merely trying to turn off of the vibration alarm. The Claimant can clearly be seen passing her hand over the phone or to adopt the words used by Mr Way, flickering over it.

101. The Claimant also told us that she did get a break later at about 12 noon, but she did not take her medication at that time as she liked to take it at certain times of the day. She said had waited till the 8 p.m. time to take it. If the Claimant felt unwell and was trying to make to take her medication at 11:30 a.m., it made no sense that she would not take it when she went on her break at around about 12 noon. If she already felt unwell, the consequences of not taking it would have been aggravated as the day ran on.

102. In a similar vein, the CCTV shows the Claimant did talk to Mr Oteng after she put her phone away which was only a few minutes after she claimed her vibration alert on her phone went off to remind her to take her medication, but there is no indication that she was asking him to take over so that she could go on a break. The Claimant says that when she was pointing to the screen while her colleague was with her and they were both looking at it, she was pointing to the time to show how long she had been on the screen, but there is no indication that she was asking for him to take over so that she could go to take her medication as they both walked away from each other in a relaxed manner.

103. We also note that the Claimant complained about being left alone to work on the staff lane but when she went to welfare meetings accompanied by her trade union representative, she said she was given enough support and was able to take breaks when she needed them. We recognise that she had sent an earlier email complaining about the position, but when this was followed up at the welfare meeting, she did not reiterate the complaint.

104. The Claimant's allegation that she was left alone and could not contact anyone are clearly not correct when you view the CCTV. It is possible to see on the CCTV that there are a number of staff members around including the staff beside the archway metal detector. While the archway metal detector members of staff are on the other side of the conveyor belt from her, they were within speaking distance. In fact, on one occasion when the Claimant appeared not to have noticed that a bag had got stuck on the Xray conveyor belt, the archway staff can be seen talking to the Claimant to ask her to move it on. Other staff can be seen passing along next to her, returning from the railway side and some of them are obviously greeting her.

105. Overall, the Claimants evidence made little sense. We can see her on the CCTV for quite a period where she is clearly flickering her fingers across the mobile phone screen. There was no dispute about the fact that there was a telephone at the desk at the commencement of the staff access lane and we do see on CCTV that the Claimant walked up to that desk on occasions and was clearly able to use that telephone. In the welfare meeting she had referred to using that phone to call for assistance and she told us that she normally used that phone for that purpose. She claimed that on 23 December 2017, no-one had answered her calls and there was no-one to help her but if that is the case, she chose not to ask any of the staff around her for assistance or to opt for an emergency stop to the conveyor belt machinery to enable her to take a break. In all the circumstances it is our conclusion that the Claimant's evidence was, on a number of occasions, not reliable.

CCTV



106. We scrutinised the CCTV clip which we were shown very carefully. It would not assist to set out a blow by blow account of it, so we just mention some key points. The CCTV commences at 11:20:07. The CCTV camera is positioned high up looking towards the doorway of the UK side of the terminal. There is a large conveyor belt along the middle of the screen and at the entry end of that there is a desk across it. Beyond that, at the end at the very top of the screen, there are sliding doors which appear to open automatically when someone comes through. To the right of the screen by the wall, there is a lane which we understand is the lane where staff walk when they are returning from the railway side towards the UK side, which we shall call the return lane. Next to that there is a space along the side of the conveyor belt where the Claimant and her colleague who are manning the staff access lane can sit or walk, which we shall refer to as the staff duty lane. To the left, beyond a pillar, there is a metal detector archway which persons being screened have to walk through. There is a wide area on the far side of the conveyor belt which the staff being screened use when moving towards the railway area and to collect their luggage.

107. At the commencement of the clip, the Claimant is seated in the middle of the screen with her back towards the camera. She is sitting on the right side of the conveyor belt in the staff duty lane. There is a small table in front of her with some kind of keypad on it and above that there are two fairly large computer screens which show the baggage running through. When the Xray machine has baggage inside there are two red lights which light up. At all times, there is one green light in the centre which stays on constantly.

108. Staff and passengers with additional needs, including wheelchair dependent persons, going to the railway side of the terminal come through the automatic sliding doors and go around to the left side of our screen where they pick up a tray and put their belongings into it, if they have any luggage, as well as their coats or jackets. They then move through the metal detector archway and some of them (presumably those who set off the metal detector) are checked by one of two members of staff who are standing on the floor on the railway side of that archway. They then have to walk along the conveyor belt to an area which we can see at the bottom left of our screens, to collect their belongings. There is some kind of clear screen preventing them from picking the luggage off the conveyor belt closer to the X-ray machine.

109. To the far top left of our screen we can see the passenger security lanes which are adjacent to the staff access lane. We can only see some parts of them but it is clear they are constantly busy. There is a permanent stream of luggage on the conveyor belt and lots of people in view on those lanes. The staff access lane is much quieter, with only occasional luggage being put through the scanning machine.

110. At 11:20:09 you can see the door into the lane open and a uniformed individual who appears to be a member of staff standing in that doorway. You can also see the body search staff on the other side of the x-ray scanner. They move closer together and are looking at something. At 11.20.21 you can see they are looking together at a mobile phone. This was pointed out by the Claimant's counsel. We had not noticed it until it was pointed out and we believe the Respondent's witnesses had not realised it until that time.

111. The Claimant is sitting in a chair facing towards the Xray machine. At 11.20.24 the person in the doorway moves further back into the area beyond the

automatic doors and they close. Mr Oteng is not in sight of the camera at this time. At 11:21:06, that is approximately one minute into the clip, the automatic door has opened, and a person is walking around who subsequently takes off his jacket and various belongings and puts them into a tray and then moves towards the body scanner. This is the first person we have seen using this staff access lane and they move towards the body scanner at 11:21:29.

112. At 11:22:35 two women are taking their coats and jackets off and putting luggage into trays to go through the staff scanner. At 11:23:10 the second of the two women's luggage tray stalls at the end of the Xray conveyor belt. The Claimant appears not to notice. At 11:23:40 the woman goes up to try to find her luggage. At 11:22:44 one of these security guards from the archway metal detector moves closer to the conveyor belt on their side and appears to speak to the Claimant to tell the Claimant she needs to move the tray on, which she does.

113. At 11:24:17 a gentleman comes in accompanying a young boy. He assists the boy to take off his overclothes and put them in the tray. They both walk through the body scanner and to the far and wide of the conveyor belt where the bags should come out for them to reclaim their possessions. When the man is waiting for their possessions, he begins to look at the Claimant. This is Mr Randazzo. At this point at 11:24.50 a woman (Ms Curtis) walks through the doors and to the front of the conveyor belt. The man lifts his arm up high and points down towards the Claimant. The woman leaves her tray at the far end of the conveyor belt and walks round the edge around the desk and begins to go down the exit lane towards the Claimant who gets up out of her chair and walks towards her. By this stage it is 11:25:00. The woman and the Claimant exchange some words, and then they both walk towards the desk. The woman walks back around the outside of it and goes away.

114. At 11:26:18 the Claimant is by the desk. At 11:26:35 the Claimant starts to go back towards the Xray screen seating location. When she gets there, she remains standing, but pulls something out of her pocket. At 11.26.36, as the Claimant gets back to her seat, another man comes in and walks slowly around towards the rear of the desk. This is Mr Oteng. At 11:26:39 you can see the Claimant in front of the X-ray monitors, still standing and she has pulled something out of her pocket which is bright, clearly a phone. The Claimant remains standing by the X-ray screens, but she has the phone in her hand and she appears to be doing something with it. She is standing with her head is bowed as though she is looking at it. The Claimant's hands are visible moving and flickering across the phone screen. Another man comes in, walks through the archway detector at 11:27:40 and walks down to wait for his luggage. The Claimant is standing by her location. Her phone is still in her hand and she is using it in some manner. The other individual is at the X-ray side of the desk. The two red X-ray lights come on at 11:27:57 so there is a bag in the machine, and the conveyor belt continues to go through. At 11:28:21 we can see two bags have gone through the X-ray machine while the Claimant has her phone in front of her. At 11:29:02 the Xray lights go on again. The Claimant still has a phone in her hand. The tray comes through and the Claimant puts her phone away in her pocket at 11:29:08. Between 11:26:39 and 11:29:08, the Claimant had her phone in her hand. During that time three bags went through the X-ray scanner.

115. At 11:29:19 the Claimant walks away from her station up towards the desk. She stands beside Mr Oteng and they talk from 11:29:24 till 11:29:47 when she begins to walk back towards her station. At 11:29:53, Mr Oteng has followed her

down is standing near her while she stands at her station in front of the X Ray screens. At 11:30:02 Mr Oteng moves back slightly but they continue to talk and the X Ray machine lights come on. At 11:30:07 Mr Oteng has walked most of the way back to his desk but the Claimant is pointing at something in the top left corner of the right hand screen and still talking to him. He walks back towards the Claimant's screen and she points at the symbol at the top left of the right hand screen while the tray comes through the X-ray machine. All the while that tray is in the machine, it appears her focus is on the symbol in the top left. The Claimant is talking and gesticulating with her arms. At 11:30:39 Mr Oteng starts to move back to the desk again. At 11:30:40 the lights on the X ray machine come on again. The Claimant walks away from screen towards Mr Oteng at the desk. She is away from the screen for the rest of the time that the tray is in the X Ray machine as by the time she walks back at 11:30:50, the red lights have gone off and the tray is coming out of the X Ray machine.

116. The X-ray lights go on again at 11: 31: 20. The Claimant is leaning back against the rail between her duty area and the return lane. She looks to her left towards a person who is waiting for their luggage at the far end of the conveyor belt. The Claimant walks up to Mr Oteng at the desk at 11.31.46. At 11:31:56 the Claimant is standing right beside Mr Oteng at the desk. Three members of staff come in and the Claimant begins to walk back to her station at 11:32:13. The X-ray lights go on at 11:32:34. The Claimant is looking at her screen briefly but then looks away back towards the area where the passengers are collecting their luggage. Two trays go through and at 11:32:50 the Claimant starts to look away. A third tray comes through. The Claimant taps her keyboard and the tray reverses into the machine briefly and then comes out again. The fourth tray comes through the machine and the Claimant taps her keyboard.

117. After that it is a quiet time and the Claimant walks up to the desk and is talking to Mr Oteng for a period while there are no passengers coming through. Then another passenger appears and the X-ray lights go on at 11:37:18. The Claimant walks back towards her screen and leans around and taps the keyboard. It is difficult to see how she could have viewed the monitor screens at that angle. Then she moves to stand in front of it but leaning back and still talking to Mr Oteng. At 11:38:10 a tray goes through and the Claimant appears to be focused on her conversation with Mr Oteng. Another tray goes through at 11:38:21 and the Claimant is still talking to Mr Oteng, though she is standing by her workstation and does appear to glance briefly at the screens. At 11:38:46 the lights go on again and the Claimant is still talking to Mr Oteng while standing at her screen. A tray comes out at 11:38:55. The Claimant is in front of her screen. At 11:39:38 the X-ray lights come on again. The Claimant has been standing in front of a screen but still talking with Mr Oteng who is still at the desk. A few seconds later the clip ends.

## **Submissions**

### The Claimant's submissions

#### Reasonable adjustments

118. In relation to the claim that the Respondent had failed to make reasonable adjustments, the Claimant submitted that the phrase "provision, criterion or practice" ("PCP") should be construed widely so as to include formal or informal policies, rules, practises arrangements and including one off decisions and actions. The Tribunal were urged to find the Respondent had applied a PCP that

disadvantaged the Claimant, being that of allowing only one security officer to work at the staff lane access area.

119. The Claimant argued that the Respondent had failed to make reasonable adjustments for the Claimant despite the fact that the PCP caused her a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

120. The disadvantage she would suffer had been to set out in the list of issues as the likelihood she would fall asleep/become unwell/need assistance due to her disability when left alone.

121. The Respondent had failed to make reasonable adjustments for her. The duty to make reasonable adjustments included adjustments around dismissal.

#### Discrimination arising from disability

122. This claim was one where the Claimant would suffer from the risk of falling asleep/becoming unwell or failing to ask for help due to her disability when left alone and the Claimant argued but she had been treated unfavourably because of that.

123. The Claimant said that in order to determine this claim, the Tribunal had to decide what was happening on the CCTV. It was the Claimant's submission that she was trying to turn off her alarm. We were urged to accept that the Claimant was a credible witness. As for the suggestion that there was a problem with her looking at her phone, we were reminded that another officer could be seen on the CCTV on his mobile phone.

#### Unfair dismissal

124. The Claimant's main submission on this was that dismissal fell outside the range of reasonable responses. This should be judged by reference to the objective standards of the hypothetical reasonable employer. The Claimant argued that dismissals for gross misconduct were usually appropriate where there had been a series of misconduct issues, or where the wrongdoer might expect to be dismissed for what they had done because of the serious nature of the matter such as fighting or stealing. That did not apply here.

125. In this case the Claimant had long service and a clean record which the Respondent was obliged to take into account. Given the Claimant's length of service and relevant experience, it did not follow that she could no longer be trusted to work for the Respondent at all. There was no damage done to the relationship with Eurostar and no gross negligence in the case. It was exaggerating to say this was the case.

126. Additionally the Claimant said that there were procedural errors which rendered the dismissal unfair. In particular the delay in suspending her and the delay in interviewing the witnesses who could be seen on the CCTV.

127. The Claimant reminded the Tribunal of the burden of proof in relation to discrimination. All the Claimant had to prove was that on the balance of probabilities there were facts from which the Tribunal could conclude, in the absence of that an adequate explanation, that the employer has committed an act

of discrimination against the Claimant. Where the Claimant had proved facts from which such conclusions could be drawn, the burden of proof moves to the employer. The Claimant also drew to the Tribunal's attention the fact that where there are multiple allegations the Tribunal should consider whether the burden of proof has shifted in relation to each one and should not take an across the board approach. The Claimant suggested the Respondent had offered no credible explanation and the Tribunal should therefore enquire as to the conscious or subconscious mental processes that led the Respondent take a particular course of action in respect of the Claimant and consider whether her protected characteristic played a significant part in that treatment.

#### The Respondent's submissions

128. The Respondent confirmed that it conceded that Claimant was a disabled person by reason of her diabetes.

#### Reasonable adjustments claim

129. The Respondent argued that it had no PCP of requiring employees, including the Claimant, to work alone. The Respondent also submitted that it did not apply any such PCP to the Claimant as she was not left to work alone. She worked with a colleague on the staff access lane, sharing duties for the lane. She worked in an area where there were many other security officers present at all times, including fixed and roaming staff. She had access to an internal telephone system which provided her with access to supervisory and management staff. She was never left in a position where she was unable to contact or rely on the support of colleagues in the performance of her duties.

130. In relation to the question of whether, if there was such a PCP, it put the Claimant at a disadvantage in that she was likely to fall asleep, become unwell/ fail to ask for assistance due to her disability when left alone, the Respondent acknowledged that because of her diabetes disability the Claimant would have been at greater risk of some of those events.

131. In relation to whether there were reasonable adjustments which the Respondent ought to have made to avoid the disadvantage, such as not leaving the Claimant alone for longer periods and allowing her to take regular breaks, it was submitted that the Respondent had made the adjustments contended for. The Claimant was not left alone for longer periods and had the support of other people and was allowed to take breaks at the time she needed to take her medication.

#### Discrimination arising from disability

132. As regards this contention, the Respondent admitted that being unwell and falling sleep were things which did arise in consequence of the Claimants disability, but failing to ask for help was not something which might arise from it.

133. The Claimant had already agreed that if she required a break, she would ask a supervisor for help. The Claimant was not dismissed for being unwell or falling asleep as the Respondent did not rely on the allegation that she had been asleep. Rather the Respondent's dismissing officer, Mr Sasson, accepted the Claimant's diabetes could cause fatigue and sleepiness while on duty and expressly excluded that allegation from his decision.

134. In relation to the question of unfavourable treatment, the Respondent accepted that dismissal was unfavourable treatment. The Respondent also accepted that one of the reasons the Claimant was dismissed was that she was using her mobile phone.

135. The Respondent rejected the fact that this arose in consequence of the Claimant's disability and argued that she did not look at her phone because the alarm went off. The Claimant did not take her medication around the time when she claimed the alarm went off as she had stated in evidence she would set an alarm around 15 minutes before she would need to take her medication and that she would then take her medication. The Respondent suggested that the CCTV showed that the manner which the Claimant interacted with her phone was inconsistent with her assertion that she only turned off an alarm. The Claimant took out her phone at 11.26:39 and it was not credible that she had only been trying to turn her alarm off for that specific period of time. On taking her phone out for pocket she spun it around in her hand for a few seconds before unlocking the telephone and beginning to interact with the screen. If the phone had been sounding an alarm, she would have instantly interacted with it in order to silence it. She could then be seen interacting with her phone between 11.26:43 and 11:29.09, that is for two minutes and 26 seconds. It was not credible that the Claimant took that amount of time to silence an alarm.

136. The Respondent argued that the Claimant was not dismissed because of something arising in consequence of her disability, but because Mr Sasson did not accept her explanations for using her mobile telephone.

137. In relation to the question of whether dismissal was a proportionate means of achieving a legitimate aim, the Tribunal had to assess the Claimant's contention that the Respondent did not act proportionately because it had failed to make reasonable adjustments for the Claimant when it left the Claimant alone for long periods of time without breaks. The Claimant also relied upon her length of service and surrounding circumstances. The Respondent submitted that if the Tribunal did find, despite their submissions, that the Claimant was dismissed for a reason arising from her disability, the dismissal was justified. The Respondent had a legitimate aim of ensuring the restrictions on items to be taken through the security area of Eurostar terminal at St Pancras are properly enforced. The Respondent submitted that although there was a balancing act to determine whether a particular measure was justified, in this case it must take into account the nature of the Respondent's operations which meant that it could not permit any lapse in performance while the Claimant was on duty. For that reason, the Respondent had put in place measures which would allow the Claimant to deal with any sudden effect that her disability had on her ability to perform her role by removing herself from active operation. The agreed procedure did not involve the Claimant using her mobile phone while on duty and such an adjustment would not have been reasonable because of the risk that if the Claimant would be able to use her mobile phone on duty, she would be distracted from her primary duties.

#### Unfair dismissal

138. The Respondent argued that it had shown that the reason, or principal reason, for the dismissal was the Claimant's conduct in failing to monitor the security screens while using her mobile telephone and talking to a colleague. That was a conduct reason which is a potentially fair reason.

139. The guiding principles for assessing the fairness of the conduct dismissal are derived from the case of *BHS v Burchell* [1980] ICR 303. The Respondent submitted that that required it to have conducted a reasonable investigation and to have reasonable evidence. It submitted that the Respondent's investigation covered all matters which could be reasonably required as it had obtained the CCTV footage, carried out two investigatory meetings with the Claimant and shown her the CCTV footage. The Respondent had interviewed and a number of members of staff. The Respondent had not reviewed the Claimant's mobile telephone bill, but this would not have explained what she was doing on the phone and no one had suggested that she made or received calls or sent texts. In relation to the Claimant's allegation that there was a delay in the investigation process, this was because the Claimant was absent from work between 29 December 2017 and 25 March 2018. Once the Claimant's position in relation to the charges made against her was clear, the Respondent carried out further investigation into these allegations by interviewing relevant witnesses. The Respondent submitted it was reasonable to wait to progress the investigation until after the Claimant had been interviewed. The key evidence was in any event the CCTV footage which the Respondent relied on in dismissing the Claimant.

140. In relation to the suggestion that the Respondent had a policy of requiring employees to look at screens for a maximum of 20 minutes at a time, the Respondent had established that there is no such policy for the staff access lane. In relation to the Claimant's allegation that she had been left alone when she should not have been, she had not been left alone as it was clear there were colleagues around her throughout the relevant time. The Respondent denied there been any contradictory evidence and argued that it primarily relied on the CCTV footage. In relation to the argument that the Claimant was not suspended immediately from work indicating that her conduct was not in fact viewed seriously, the Claimant had been immediately suspended as soon as there was evidence which demonstrated the full extent and severity of her misconduct.

141. In relation to the question of whether dismissal was a reasonable sanction the Respondent argued that the Claimant's conduct constituted a serious neglect of her duties. She had failed to pay proper attention to the Xray screens that she was tasked with monitoring and created a serious risk to the security of the restricted area. The Claimant was engaged in duties which required her to pay her absolute and undivided attention to her duties. The Respondent likened position to that in the case of *Turner v Pleasurama Casinos Limited* [1976] IRLR 151 and quoted from Mr Justice Phillips in that case who said: "*this particular field of employment is a very special field, one in which a departure from prescribed standards of conduct may justify dismissal, particularly where it lies in a central part of the duties which an inspector is employed discharge, that is to say, to prevent by observation and inspection, fraud occurring*".

142. The Respondent argued that the Claimant had contravened an absolute prohibition on using her mobile phone and offered no reasonable explanation for it. The Respondent also argued that the Claimant's conduct was likely to bring the Respondent in to disrepute as it was visible to staff using the access lane and the public using the public access lanes. Although the Claimant had not been subjected to any historic disciplinary sanctions, she had been offered specific support to eliminate the potential effects of her disability on her ability to carry out his duties properly and the Respondent rejected any suggestion that her disability offered any effective mitigation where she failed to follow the procedure agreed between the parties.

143. On the breach of contract claim, the Respondent pointed out that the Claimant had made a claim for wrongful dismissal and submitted that the Tribunal should find as a matter of fact that the Claimant had used her mobile phone on duty, and failed to pay proper attention to the X-ray screens, thereby creating a serious security risk and that that was gross misconduct justifying summary dismissal.

## The Law

### Reasonable adjustments claim

144. Section 20(2) of the Equality Act 2010 provides *the first requirement is a requirement, where a provision, criterion or practise of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

### Discrimination arising from disability

145. Section 15 of the Equality Act 2010 provides that *[the employer] discriminates against a disabled person if – [the employer] treats the person unfavourably because of something arising in consequence of the persons disability and [the employer] cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

### Unfair Dismissal

146. Section 98 of the Employment Rights Act 1996 provides as follows:

*(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—*

*(b) relates to the conduct of the employee,*

*(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.*

14. The leading case on the approach to conduct dismissals is set out in the case of British Home Stores v Burchell

*First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.*

In summary the Tribunal must ascertain (i) whether the dismissing officer held a genuine belief in the Claimant's guilt, (ii) whether there were reasonable grounds for that belief, and (iii) whether at the stage the dismissing officer formed that belief, the Respondent had carried out as much investigation as was reasonable into the matter.

148. Another guiding principle is set out in the case of Foley v Post Office which provided that when an Employment Tribunal looked at whether a dismissal was reasonable, the test related not to an assessment of what tribunal members would think or do, but rather whether to ask whether the employer's response was within a 'band or range of reasonable responses' of a reasonable employer to the situation.

149. In the case of Sainsbury Supermarkets Ltd v Hitt [2003] IRLR 23 the Court of Appeal also applied the 'reasonable responses' to the reasonableness of the employer's investigation and the procedure followed by the employer (the third Burchell requirement).

150. In Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, it was noted that the duty to make reasonable adjustments and the prohibition from discrimination arising from disability may be closely related. *"An employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct."*

## **Conclusions**

Did the Respondent have actual or constructive knowledge at material times of the Claimant's disability?

151. The Respondent did have actual or constructive knowledge at material times of the Claimant's disability. The Respondent conceded this point.

Did the Respondent fail to make reasonable adjustments for the Claimant?

152. This entailed considering whether the Respondent applied the following PCP to the Claimant:

- requiring the employees including the Claimant to work alone

153. We are mindful of the case law drawn to our attention by the Claimant. We concluded that there was a PCP which required some employees, including the Claimant to work alone. We took that view because it was clear that although there were usually two members of staff on the staff access lane, the system allowed for one of the members of staff to take a break. We can see from the CCTV that Mr Oteng was not at the desk for a period. Mr Oteng was rostered as break relief, according to the notes of the investigation meeting with the Claimant and Mr Aderibigbe on 12 June 2018, which wasn't explained, but might mean that he covered the Claimant's breaks and those of other staff, while she covered his. Given Mr Oteng's absence for a period on that day, it is clear that in the staff access lane employees did work alone on that duty at times. Although we do not accept the staff on the staff access lane worked alone on that duty for longer periods, and we do not consider the Claimant was alone as there were other staff members around, we are satisfied that in the circumstances, this was a PCP.

Did that PCP put the Claimant at the following disadvantage?

The Claimant was likely to fall asleep/ become unwell/ need assistance due to her disability when left alone

154. In relation to the question of whether that PCP put the Claimant at a disadvantage compared to other employees, our view was that all employees faced the same potential disadvantage of needing to leave their work for some physical emergency. The Respondent clearly envisaged this, because the Code of Conduct addressed comfort breaks and specifically referred to the possibility of employees needing to leave their station urgently for a period. Nevertheless, we decided that we should consider whether the Claimant was put at a greater disadvantage than other members of staff. For these purposes, we accept that the Claimant could be at a greater disadvantage than others of becoming unwell or needing urgent assistance, because of her disability. We do not accept that she was at the additional disadvantage of failing to tell other people that she needed help. There was no evidence at all which suggested that could be a consequence of her disability. Throughout the welfare meetings, when there had been a discussion about adjustments that could be made, it had been clear that the Claimant thought she was perfectly able to draw her problem to the attention of other staff.

155. In our view, the question of whether the Claimant was at a substantial disadvantage in comparison with persons who are not disabled could not be considered without recognising the arrangements which had already been made to accommodate the Claimant, and the reality that working on her own did not mean she was working alone. In relation to the question of reasonable adjustments, the Claimant's case was these adjustments should have been not leaving the Claimant alone for longer periods and allowing her regular breaks. We were satisfied the Respondent had put those adjustments in place.

156. In practice, requiring the Claimant to work alone for periods on the staff access lane screening duty, did not equate with leaving the Claimant to work entirely alone. The Claimant was not left alone. We have acknowledged that the Claimant could be left working on screening the Xray monitor in the staff access lane for some periods, but there were other staff close by in the metal detector search area. There was a system of the Claimant being able to contact various management members so that they would arrange her for her to be relieved. There

was a telephone on the desk which she could use to call those staff members. Other staff members walked past her along the return walkway and used the staff access lane to get to the railway side. There were all sorts of staff around her, moving back and forward constantly, or working close by to her, many of whom she could have asked to find a member of management for her urgently. For these reasons we are satisfied the Claimant was not at a substantial disadvantage compared to persons who are not disabled.

157. Additionally, there was a system allowing the Claimant regular breaks. She was the only member of staff (or possibly one of few members of staff) who got fixed breaks as opposed to having their breaks assigned to them on the day. Those breaks were designed to facilitate her taking her medication, which she made clear to us she liked to take on a regular basis. She was also able to ask for additional breaks if she wanted them and the Respondent had made every effort to put in place adjustments to accommodate her. Ultimately, if there was no one else around, the Claimant was able to stop the Xray conveyor belt and walk away from her workstation to take a break.

Were the following reasonable adjustments for the Respondent to have made to avoid the disadvantage?

- not leaving the Claimant alone for longer periods
- allowing the Claimant to take regular breaks

158. We have noted that the Claimant was not left alone for longer periods. We have also noted that the Claimant was allowed to take regular breaks.

159. In consequence it is our view that the Claimant was not subject to a substantial disadvantage as compared to non-disabled persons, but if we are wrong in that, it is our view that sufficient adjustments were in place to prevent or avoid the disadvantage.

160. We were reminded by the Claimant's Counsel that there could be a need for reasonable adjustments in relation to dismissal but this was not on the list of issues and was not raised by him at the outset of the hearing. Nevertheless, he appeared to suggest that dismissal should also been subject to reasonable adjustments. In this case, we note that the evidence points to the Claimant having breached serious aspects of the Respondent's policy on not using a mobile phone while on duty. The Respondent made it clear in answer to questions raised by the Claimant's Counsel that had the Claimant ever indicated she wanted to use her phone as an alarm for her medication, they would have considered making adjustments around a controlled method for her to do this, but she did not do so.

161. Finally, we concluded that the Claimant's use of the mobile phone had no connection with her disability. Rather the length of time and the manner in which she was using her phone indicated she not using it simply to remind herself of her need to take her medication.

#### *Discrimination arising from disability*

162. The Claimant contends that the Respondent subjected her to unfavourable treatment by dismissing her for being unwell/ falling asleep/ failing to ask for help.

The first question which arises is what was the “something arising” in consequence of her disability of diabetes.

163. The Claimant contends that the dismissal was because of something arising from disability because she became unwell/ fell asleep/ failed to ask for help because of her diabetes.

164. We are satisfied the Claimant could become unwell or sleepy as a result of her diabetes. There was no evidence that she might fail to ask for help because of her diabetes.

165. The next question which arises is whether the Claimant was subjected to unfavourable treatment. The Claimant contends that she was subjected to unfavourable treatment when the Respondent dismissed her for looking at her mobile telephone. We accept that dismissal is unfavourable treatment but the question which arose was whether the Claimant was dismissed because of something arising in consequence of disability when she looked at her phone when her phone alarm went off to alert her to take her diabetes medication.

166. We concluded that the Claimant’s dismissal was not because of something arising in consequence of her disability. Specifically, the assertion here is that she looked at her phone when her phone alarm went off. The Claimant’s submissions are that this is a question of fact and in order to determine it, we should find in favour of the Claimant and her explanation. The Respondent’s submissions largely reflected the same point, that this is a question of fact.

167. We considered the Claimant’s explanation, and we carefully examined the facts. We also reviewed the CCTV in some detail. We have explained which aspects of the Claimant’s evidence we found to be unreliable and why. In particular we do not accept that her phone alarm went off to alert her to take her medication. We have explained that the reason for this is that the timing does not accord with the Claimant’s explanation as to when she regularly took her medication. The Claimant’s actions with her phone are not consistent with her simply trying to turn off the alarm. The Claimant’s behaviour was consistent with the Respondent’s belief that she had breached its policies and spent time looking at her phone. This was not something arising in consequence of her disability.

168. If we had concluded that the dismissal was for something arising in consequence of the Claimant’s disability, the Respondent would have a defence if it could show that the dismissal was a proportionate means of achieving illegitimate aim. The Claimant contends that dismissal was not a proportionate means of achieving a legitimate aim, because, amongst other things the Respondent had failed to make reasonable adjustments for the Claimant when it left the Claimant alone for long periods of time and without breaks. The Claimant also relies on her length of service and all the surrounding circumstances.

169. Since we are satisfied that the claim of discrimination arising from disability is not made out, it is not necessary for us to address this point but for the sake of completeness we would like to add that, had we concluded that there was a dismissal because of something arising in consequence of the Claimant’s disability, we would have concluded that it was a proportionate means of achieving a legitimate aim. We accept the Respondent’s evidence that the security risk was severe. While the Claimant pointed out that, by this time the security risk had been downgraded for the general public, we accept that nevertheless transport hubs are

particularly vulnerable and it was essential that staff carrying out security duties did so to an alert and conscientious standard. The Claimant's behaviour was wholly inconsistent with this and we conclude that her dismissal was a proportionate means of achieving the Respondent's aim of ensuring the safety and security of the passengers through St. Pancras, or as the Respondent put it, ensuring the restrictions on items to be taken through the security area of the Eurostar terminal at St Pancras were properly enforced. That is in our view a legitimate aim. Additionally, the Claimant's dismissal was proportionate, as concentration and focus at all times are critical and essential if the restriction on items is to be properly enforced.

*Unfair dismissal*

170. The first question we had to consider that whether the Respondent has shown the reason or principal reason for the dismissal and that it was a potentially fair reason.

171. The Department for Transport threat level in December 2017 was severe according to the Respondent. It was clear that the Respondent did not dismiss the Claimant for sleeping as that was expressly set out in the letter of dismissal. The rest of the reasons given by Mr Sasson in the letter of dismissal and in his witness statement and in his evidence, could be summarised as being that she was looking at her phone for approximately 2 1/2 minutes. He rejected her explanation for that being that it was vibrating as she said it was and he concluded that amounted to gross misconduct. In his mind she was not paying full attention to the X-ray screen monitors and had allowed baggage to go through without checking the screen. This was both through the use of her mobile phone and when she was talking to her colleagues. In the circumstances, the reason for the dismissal was a conduct reason.

172. We then had to consider the three elements of the Burchell test. First, we considered whether the Respondent's dismissing officer had a genuine belief in the Claimant's guilt. Mr Sasson was the dismissing officer. In his witness statement he explained that having considered all the evidence he came to the conclusion that, while the Claimant denied the allegations, she had indeed broken the rules by consulting her mobile phone for 2 1/2 minutes and ignored three trays of personal belongings as they went through the scanning device. He also said he considered the Claimant's actions in relation to the mobile phone usage were gross misconduct. He gave detailed reasons for dismissal both in the letter of dismissal and in his witness statement and when he was cross examined, he confirmed that it was his clear view that the Claimant had committed a gross negligence. Mr Sasson made it clear that he had relied heavily on the CCTV, but he had carefully examined the notes of the two investigation meetings with the Claimant, and the notes of the investigation meetings with the other staff present. We are satisfied Mr Sasson had a genuine belief in the Claimant's guilt.

173. Secondly we had to consider whether there were reasonable grounds for that belief. In the light of the CCTV footage and the investigation minutes, there were clearly reasonable grounds for Mr Sasson's belief.

174. Thirdly, we had to consider whether at the stage Mr Sasson formed that belief, the Respondent had carried out as much investigation as was reasonable into the matter. The Respondent held two meetings with the Claimant on the 18th of April and 12th of June 2018. It looked at the CCTV in some detail. The

Respondent interviewed the witnesses in the vicinity once the Claimant said that she had been feeling unwell and had been using her phone to try to find contact numbers for someone to assist her. Until the Claimant gave that explanation on the 18th of April 2018, the Respondent had no information to rely upon other than the CCTV which clearly showed the Claimant using her mobile phone while at the Xray monitor screen. Once the Claimant gave an explanation for that usage, the Respondent discussed the situation with her colleagues on duty on the day in question. It was not possible for them to do so prior to that, as they had no knowledge of her explanation since she took sick leave shortly after the suspension and before the scheduled investigation meeting. While some recollections may have been less clear than would have been the case had the while investigation been able to be pursued at an earlier stage, the Respondent had the CCTV evidence to work from. We are satisfied that amounted to a reasonable investigation.

175. Even where there has been a proper investigation, it is still possible for there to be serious flaws in the procedure which render the dismissal unfair. In this case the Claimant raised a number of matters. We have considered the arguments made by the Claimant about the flaws in the procedure.

- (a) The CCTV was not given to the Claimant. We note that at every stage the Claimant was able to see the CCTV, but not able to take a copy away. While it would have been preferable had she been able to have a copy of it, it did not belong to the Respondent and did include photographs of number of other people. The Claimant and her trade union representative were given every opportunity to view it in the course of the investigation and disciplinary hearings. We understand they did see it at each stage. They were able to comment on it. We understand a copy of the CCTV was supplied shortly before the full merits hearing. The Claimant's representatives did not seek to adjourn the full merits hearing in order to get more time to review the CCTV. In the circumstances we do not think this rendered the dismissal unfair.
- (b) The Respondent did not look at the Claimant's phone bill when she proffered it, but this was not in our view particularly relevant. No one suggested that the Claimant made a phone call or sent a text message, so looking at her phone records would not have been of assistance.
- (c) In relation to the delay in suspending the Claimant, the Claimant suggests that this means her dismissal was not reasonable because the matter was not viewed as serious. She argues that if it was serious, she would have been suspended immediately. The initial allegations were that the Claimant appeared to be asleep on duty. It was only when the CCTV was viewed that the Respondent learned that she had been using her mobile phone. Mr Sasson gave evidence that he looked into this but understood from Mr Fahim and that he did not feel it was appropriate to suspend the Claimant until he verified the position by looking at the CCTV. This event occurred just before the Christmas break and Mr Fahim's first opportunity to review it was 27 December. There is nothing to suggest that the Respondent did not regard the matter as serious. We know that the CCTV was viewed as soon as Mr Fahim returned to work and that same day the Claimant was suspended. In all the circumstances, we do not think that was in any way indicative of the allegations being less serious than the Respondent says at this hearing.

- (d) In relation to the Respondent's having taken statements from relevant witnesses six months after the event, the Respondent had no reason to know that it was necessary to take those statements nor indeed any reason to know what questions to ask those witnesses until it had its first opportunity to interview the Claimant. As the Claimant went on to sick leave before she could attend her first investigatory meeting, the Respondent was unable to meet with her until April 2018. After that, it acted promptly in interviewing relevant witnesses. The Respondent says it mainly relied upon the CCTV evidence and we accept that. The only issue which appears to have arisen from this delay was the question of whether the Claimant asked Mr Oteng to assist when she says she felt unwell. The Claimant accepted she did not ask any other members of staff for assistance or refer to being unwell. Potentially Mr Oteng might have had a better recall if he had been interviewed at an earlier date, but we are satisfied that even if Mr Oteng had been interviewed earlier and recalled the Claimant discussing her feeling unwell on the date in question, the Respondent relied on the CCTV evidence in reaching a decision that the Claimant's visible behaviour on the CCTV was not consistent with either of the explanations she gave for having been using her mobile phone on the date in question. It does not render the dismissal unfair.
- (e) The Claimant argues that the Respondent did not adhere to its own procedure of requiring employees only to look at monitors for 20 minutes at a time. We reject this argument as we are satisfied by the evidence from the Respondent's witnesses that the procedure of limiting screen monitoring time to 20 minutes only applied to the passenger lanes. The CCTV shows a very large difference between the number of people passing through the passenger lanes compared with those passing through the staff lane. Work on monitoring the screen would have been intensive and relentless at the passenger lanes but this was not the case at the staff lane. There is no need for this policy at the staff lane and we are satisfied it did not apply.
- (f) The Claimant says that she had been left alone when she should not have been. We have explained at some length why we accept the Claimant was left to work on her own on monitoring the Xray screen in the staff lane for some periods of time but we do not consider she was left alone to work. There were staff around her at the archway metal detector and passing her by the return lane from the railway side frequently. The Claimant had admitted in the previous welfare meetings that she had access to supervisors who would relieve her if she needed to leave her post. There was a telephone at the desk she could use to ask for assistance. Ultimately, she was able to stop the conveyor belt and leave in any event. In all the circumstances the Claimant was not left alone nor was she prevented from getting assistance or leaving to take her medication.

We do not consider any, or all of these matters, made any material difference and they do not render the dismissal unfair.

176. The final question which usually arises in an unfair dismissal case is whether dismissal was within the range of reasonable responses. In relation to this

question, we have considered the significance of the Claimant's role and we regard dismissal as a reasonable response and one that we believe a number of reasonable employers would have followed. Both the dismissing officer and the appeal officer, Mr Sasson and Mr Pearce, gave evidence that they were aware of security guards being dismissed while on duty using their mobile phones. It was put to Mr Sasson in cross examination that the Claimant had more than 10 years of service and no warnings or any other marks against her conduct and she could have been issued with a final warning. Mr Sasson did not agree. It was then put to Mr Sasson that she could be moved to another site. Again, Mr Sasson did not agree. It was put Mr Sasson that the Claimant could have been put through more training. Mr Sasson said this was not a matter of training. The Claimant knew how to look at the bags. He said "*she just chose to look at her phone while a bag was going through. That is not a matter for training.*" We are satisfied that the Respondent considered that alternative options to dismissal were not sufficient given the serious nature of the incident.

177. In relation to the suggestion that the Claimant's length of service and clean disciplinary record should be taken into account, we consider that those factors were taken into account. We note that Mr Sasson, at paragraph 46, of his witness statement referred to her length of service and confirmed that he did take it into account, but he concluded that it did not excuse her actions. As noted above, this was put to Mr Sasson in cross examination but he made it clear that he did not consider that the Claimant's length of service or clean record excused her actions.

178. In summary, our view is that the dismissal was for a potentially fair reason, being the Claimant's conduct. The procedure followed met the requirements of the Burchell test. The complaints raised by the Claimant about the procedure adopted were not material. We further conclude that dismissal was within the range of reasonable responses.

#### Breach of contract - wrongful dismissal

179. In a wrongful dismissal claim it is necessary to consider whether the Claimant did, in fact, commit gross misconduct. The test is different to an unfair dismissal claim.

180. The Respondent's disciplinary procedure does not expressly include use of mobile phone in the list of examples of gross misconduct. Indeed, the Claimant's Counsel pointed out that failure to observe company procedures appears on the list of misconduct examples in the Disciplinary procedure, rather than gross misconduct. These were only examples. It is our conclusion that the Claimant was using her mobile phone and talking to her colleague and it was clear from the CCTV that she was not giving 100% attention to the security screening process while trays were going through the Xray machine. We also note there was an absolute prohibition on using mobile phones on duty in the Respondent's policies. It is our view that the Claimant created a security risk by a deliberate failure to apply adequate attention to her duties when she was in charge of monitoring the Xray screens showing luggage going through the staff access lane. This is not a case where there was a medical reason for the Claimant not to apply adequate attention. Since the risk to passengers and the public generally of dangerous items going onto a Eurostar train is potentially huge, this was a serious matter and one which amounted to gross misconduct, justifying the Claimant's dismissal without notice.



181. In the circumstances all the Claimant's claims fail and are dismissed.

Employment Judge Walker

Date 8 April 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
.08/04/21.

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FOR EMPLOYMENT TRIBUNALS