



EMPLOYMENT TRIBUNALS

Claimant: Ms L Huxley

Respondent: Govia Thameslink Railway Limited

Heard at: London Central **On:** 29, 30 June & 1 July 2021

Before: Employment Judge Khan (sitting alone)

Representation

Claimant: Mr D Renton, Counsel

Respondent: Mr T Brown, Counsel

RESERVED JUDGMENT

The claim for unfair dismissal fails and is dismissed.

REASONS

1. By an ET1 presented on 12 March 2020, the claimant complains that the respondent unfairly dismissed her.

The issues

2. The issues that I was required to determine were based on an agreed list of issues which was amended following discussion with the parties:

- (1) It is agreed that conduct was the principal reason for the claimant's dismissal which is a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"). The claimant accepts that the respondent had a genuine belief that she was guilty of misconduct.
- (2) Did the respondent act fairly in dismissing the claimant in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The parties agree the following issues arise:

- a. Did the respondent have reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct?
 - b. If so, at the stage at which that belief was formed, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?
 - c. Did the respondent follow a fair procedure when dismissing the claimant?
 - d. Did the decision to dismiss the claimant fall within the band of reasonable responses?
- (3) If the tribunal finds that the dismissal was unfair:
- a. Should the compensatory award be reduced in accordance with Polkey v AE Dayton Services Ltd [1998] ICR 42 i.e. to reflect the possibility that the claimant would still have been fairly dismissed either at the time of dismissal or later?
 - b. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
 - c. Did the respondent fail unreasonably to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992?

The relevant legal principles

3. If the employer is able to show that it had a potentially fair reason for the dismissal the general test for fairness under section 98(4) ERA must then be applied. This provides:

“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.”

4. The test to be applied in a conduct dismissal was articulated by the EAT in British Home Stores v Burchell [1980] ICR 303 as follows:

“What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. 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.”

5. The first element of the Burchell test is relevant to the requirement under sections 98(1) and (2) ERA for the employer to show that it had a potentially fair reason for the dismissal. In respect of the second and third elements, which are relevant to the fairness of the dismissal under section 98(4) ERA, the burden of proof is neutral.
6. As to the standard of proof, the respondent is not required to show that it had conclusive evidence of the misconduct alleged, it is only required to show that it had formed a reasonable belief on the balance of probabilities, based on a reasonable investigation, when it dismissed the claimant.
7. The tribunal must then go on to consider whether it was reasonable for the employer to have treated the conduct in question as a sufficient reason to dismiss the employee i.e. whether this was within the ‘band of reasonable responses’ which a reasonable employer could have made in the circumstances (see Iceland Frozen Foods v Jones [1982] IRLR 439). The tribunal must not substitute its own view for that of the employer but must instead recognise that different employers may act reasonably in different ways in response to a particular situation.
8. The band of reasonable responses also applies to the procedure which the employer has followed (see Sainsbury’s Supermarkets v Hitt [2003] ICR 111). This procedure must be viewed as a whole, so that any deficiencies in the disciplinary process are capable of remediation by the appeal process.
9. When considering the reasonableness of the dismissal process a tribunal must also take account of the reason for the dismissal (see Taylor v OCS Group Ltd [2006] IRLR 613, CA; and Sharkey v Lloyds Bank Plc [2015] UKEAT/0005/15).
10. Under section 207 of the Trade Union and Labour relations (Consolidation) act 1992, the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) shall be admissible in evidence and any of its provisions which appear to the tribunal to be relevant to a question arising in the proceedings shall be taken into account in determining that question.

The evidence and the procedure

11. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal.

12. The respondent, I heard evidence from: Gary Chapman, On-Board Services Manager and the investigating officer; Karen Sherwin, Station Manager and the dismissing officer; Karen Gregson, Area Station Manager and the appeal officer.
13. For the claimant, I heard evidence from: the claimant; John Stanford, her RMT representative; and Kelsie Murphy, a Passenger Host.
14. There were two hearing bundles: an agreed bundle of 302 pages, a separate bundle of documents prepared by the claimant of 85 pages; and one item of CCTV footage. By agreement, I allowed into evidence a seven-page email chain which the claimant relied on. Unredacted versions of email correspondence which the respondent was ordered to disclose was also added to the evidence.
15. I also considered the closing submissions made by both parties.
16. References below to [X25] and [C/X25] are to the agreed bundle and the claimant's bundle, respectively.

The facts

17. Having considered all the evidence, I make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.
18. The respondent is a train operating company that operates the Thameslink, Southern, Gatwick Express and Great Northern rail franchises in England.
19. The claimant was employed by the respondent from 18 January 2016 until her dismissal on 13 November 2019. She was initially employed in the role of Rail Enforcement Officer ("REO") until she took up her post as a Passenger Host on 5 November 2017. As the job description for this role set out [B29-31], the claimant's duties fell into the following three categories: revenue protection, customer service and security. This was a customer-facing role which included: checking that customers had valid tickets for travel either at stations or on board a train, charging and issuing penalty fares, issuing tickets, ensuring effective management of automatic gatelines, reporting verbal and physical assaults, and reporting all instances of attempted vandalism, crime or trespass. In undertaking these duties the claimant worked alongside contracted security officers, PSCOs, REOs and the British Transport Police ("BTP") as and when required.
20. The claimant was line-managed by Gary Chapman, On-Board Services Manager (Great Northern).
21. Under the respondent's 'three fails' procedure, the claimant was required to contact the BTP if a passenger failed to: produce a valid ticket; pay the fare; and provide their name and address.
22. The claimant had completed an SPOE (Successful Presentation of Evidence) course which included the following definitions of assault [B35]:

“Assaults

An assault is an attempt by force or threat of violence to do bodily injury to another. The display of force should be such that force is about to be used against him.

If a man threatens to throw a punch at another person and the other person fears that the threat will be carried out, the assault is complete although there has been no physical contact.

Common assault

Many assaults are quite trifling in nature and are such that in general circumstances, the criminal law would not be applied.

Light blows by beating or being pushed usually amount to what is described as “common assault”.

Common assault is a summary offence and proceedings for this offence may be instituted by anyone including a police officer...

In any case of an alleged assault arising from a member of staff’s attempt to carry out his or her duty, police assistance should be sought. In all... circumstances laid down company procedures should be followed i.e. completion of accident instant forms / antisocial behavior [sic] form...”

23. The respondent has a ‘zero harm’ initiative which recognised that staff were at risk of abuse and harm from the public. Posters at stations warned that there would be zero tolerance of any abuse towards staff.

24. It also has the following guidance on conflict management and avoidance [B19]:

“B.5 Conflict Management

Staff must wherever possible avoid the possibility of assault...

You must make no attempt to apprehend the customer who makes off without paying. If such an incident occurs, then adhere to the following guidelines:

- If a customer or customers attempt to make off without paying, under no circumstances should any attempt be made to physically restrain, give chase, or follow them.
- If the customer becomes abusive and threatens violence, then withdraw from the situation and allow the customer to leave.
- The police should be informed immediately and given as much information as possible and the crime reference number obtained.

...

- You should never grab hold the customer, nor should you block a customer’s exit route.

B.6 Conflict Avoidance – Do’s and don’t s [sic]

Do not make yourself a target for assault...

- Don’t - Have the last word, NEVER TRY TO HAVE THE LAST WORD, this will only inflame the situation further.
- Don’t - Under no circumstances should you GRAB, HOLD or BLOCK their exit.
- Don’t - Touch. We have a no touch policy. Do not touch a customer unless it is to prevent a serious injury.

...

- Do - Report the facts. When making a statement to the Police, only report on the actual facts, do not embellish what happened it could jeopardise the case...”

Guidance in similar terms is also set out in its “Reducing Workplace and Violence” training sheet [B176].

25. The respondent’s Disciplinary Policy provides for a formal process comprising: an investigation (under stage 1) with paid suspension in relation to “Clause 9 offences” i.e. serious / gross misconduct; a disciplinary hearing (under stage 2); and an appeal process (under stage 3). Misconduct is defined as:

“any action that breaches GTR’s rules of conduct...and any such actions that have the potential to bring GTR into disrepute or cause a situation where consequences of extremely serious.”

Serious and gross misconduct are not defined in the policy but a non-exhaustive list of examples are enumerated.

26. The disciplinary penalties which the policy expressly provides for are: reprimand, severe reprimand, suspension without pay, downgrade, transfer to another site, curtailment/withdrawal of travel facilities and dismissal.

The incident at Potters Bar Station on 24 June 2019

27. During her shift, in the early evening on 24 June 2019, the claimant was at Potters Bar station waiting to join her colleague, Kelsie Murphy, another Passenger Host, on an incoming train. She waited, in the meantime, by the gateline with another colleague. When two male youths aged 17 or under (“Male 1” and “Male 2”) forced their way through the gateline and passed the claimant she followed them up to the same platform and contacted Ms Murphy who joined her when her train arrived. Having approached the youths on the platform, together with Ms Murphy, the claimant reported them to the BTP under the three fails procedure. All four boarded a London-bound train and alighted at Finsbury Park station where Male 1 and Male 2 were apprehended by waiting BTP officers.

28. The claimant and Ms Murphy agreed to provide statements to the BTP at Finsbury Park police station. In her witness statement, known as an "MG11" (as will be seen, the respondent was provided with excerpts of this statement at the material time), and obtained for the purposes of criminal investigation and proceedings, the claimant reported that Male 1 had made physical contact and assaulted her in the following terms [B68-9]:

"Male 1 then proceeded to push through the wide aisle and gate and came towards me and barged me with his right shoulder and used force to ensure that I was out of his way. The force of the barge made me step back and he made contact with my right shoulder. He deliberately barged me out of the way to get through and changed his body stance to make contact with me. He did not need to make contact with me and I gave him no permission to assault me. I stepped back from Male 1 as I was scared of any further contact with Male 2...I was upset and shocked at Male 1 barging me, I am only trying to do my job and do not need to get assaulted...the closest point I ever got to him was when he approached me, came into my personal space and barged me. My visibility was good, the station at the time was not very busy...I would recognise Male 1 again as he assaulted me...Although this was not a major assault the fact Male 1 felt he could barge me and for that to be ok is unacceptable."

The MG11 which the claimant read before signing, contained the following statement of truth:

"This statement...is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it, anything which I know to be false, or do not believe to be true."

At the end of this statement was a Victim Personal Statement which is taken into account by a judge when determining an appropriate sentence. The claimant wrote that she had been affected by this incident because she did not expect:

"things to get physical. Although it was not a major assault the fact that Male 1 felt he could barge me and for that to be ok is unacceptable".

She agreed in oral evidence that she had made an allegation of a violent offence and knew that Male 1 faced potential prosecution.

29. Having viewed the CCTV footage in real time, and also by freeze-frame, I would make the following observations: Male 1 first appears in the footage, at the 11-second mark, approaching the gateline, or barrier, without a ticket, he attempts to force his way through and the claimant, who is wearing a rucksack on her back, approaches from the other side; at 12 seconds, Male 1 is at the barrier and using his hands to force it open; at 13 seconds, the claimant points with her right arm towards Male 1 as Male 2 appears in the background; at 14 seconds, the claimant has moved closer towards the barrier with her left arm raised and pointing to her side as Male 1 continues to force open the barrier with his body turned rightwards; at 15 seconds, Male 1 has forced open the barrier and the claimant edges towards him blocking his way, her left arm still raised and pointing to the side; at 16 seconds, they are now standing very close together, with Male 1 edging towards the claimant who remains in the

same position; at 17 seconds, the claimant steps back as Male 1 continues forward now changing his stance so he is facing the claimant square on; by 18 seconds, the claimant has fully stepped back to enable both youths to pass; at 22 seconds, Male 1 is no longer visible as he has taken the ramp to the platform and is followed by Male 2, and the claimant who removes a phone from her pocket; she does not appear to be alarmed or upset. During this incident, Male 1 does not appear to have barged the claimant with his right shoulder or to have changed his body stance to make contact with her. There were patent and substantial discrepancies between the claimant's statement and the CCTV footage.

30. The claimant also completed an Accident/Assault Response & Investigation form on 9 July 2019 [B74] in which she reported that Male 1 "pushed through the gate pushing me out of the way" and that he had been "arrested for failing to have a ticket, failing to provide details and the assault on me."
31. Following an unrelated incident at Hatfield Station on 17 August 2019 the claimant complained about two BTP officers which investigated by Temporary Inspector ("T/I") Gary Pinner.

T/I Pinner's complaint about the claimant on 27 August 2019

32. The decision on whether to charge Male 1 in relation to the Potters Bar incident was also referred to T/I Pinner (by the relevant investigating officer). He concluded that there was no case to answer and no further action to be taken. He made this decision having reviewed CCTV footage of the gateline incident at Potters Bar. He wrote to the respondent, including Mr Chapman, on 27 August 2019, to complain about the claimant in the following terms [B96-7]:

"We have had a report of a staff assault at POTTERS BAR...The staff member Lindsey HUXLEY has alleged assault by being pushed, she has also written and signed a statement to that effect – the problem is on review of the CCTV there is no physical assault. The suspect does indeed push through the barrier, however HUXLEY has stated she is shoulder barged out of the way, and the force makes her step back, and there is no contact whatsoever that takes place.

"The suspect is in her face, and this is completely unacceptable, but I cannot send that for a charging decision, as if I am honest, I am considering if HUXLEY needs to be interviewed under caution by my officers for perjury/perverting the course of justice. I don't want to go down this route and hope that suitable action from GTR would prevent the need for this.

Can we make time to review the CCTV and statement and work out the next steps...it needs looking at, as staff members claiming unlawful assaults against them and it not being the truth causes issues for everyone as you are well aware."

T/I Pinner noted that this "matter is somewhat complicated" because he was also dealing albeit separately with the claimant's complaint about two BTP officers. I do not find that this signifies that there was a conflict of interest. I also find, having reviewed the CCTV footage, that it is likely that

T/I Pinner was raising a genuinely held concern that the claimant had made a false allegation of assault and was not motivated by the complaint she had made, as the claimant contends.

33. Considering this email as a whole and also taking account of T/I Pinner's subsequent correspondence, I find that he was conveying not only the prospect that the claimant had perjured herself or perverted the course of justice but a wider concern about the impact of the claimant's actions on the integrity of incident reporting from the respondent's staff to BTP officers. He was also making it clear that his preference was that the respondent took action in relation to the claimant. I accept Mr Chapman's evidence that he understood "suitable action" meant potential disciplinary action. Mr Chapman replied [B96]:

"This is not the first time that Lynsey has exaggerated and she has been spoken to previously. If you feel that her actions are serious enough to speak to her formally, then please do so."

As he confirmed when giving oral evidence, Mr Chapman took what T/I Pinner said at face value. He had not seen the CCTV footage himself at this stage. Mr Chapman's evidence was also that his instinctive reaction was to believe the BTP and to disbelieve the claimant. A relevant factor was his belief that the claimant had previously exaggerated. I also take account of comments made by Mr Chapman in unrelated email correspondence to other colleagues when he referred to the claimant as "a big gob" [B44] and "a gobshite" [B46]. I should note that when these documents were put to him in redacted form Mr Chapman said that he was unable to recall or deny whether he made these comments although he said that these were not expressions that he used. Whilst his evidence was plainly wrong, as the unredacted material revealed that Mr Chapman did make these comments, I find that much of the other evidence given by him was credible because he made a number of concessions which did not necessarily assist the respondent's case in response to propositions put to him in cross-examination.

34. Mr Chapman also corresponded about this issue with Angela Palmer, Customer Service Route Manager (Great Northern) who told him that she would leave it to him to make arrangements to view the CCTV footage and also to conduct an investigation [B48]. When Mr Chapman replied that this was not a one-off and suggested that an investigation might not be required, Ms Palmer directed that the facts would need to be ascertained. An investigation was therefore necessary.
35. Mr Chapman met T/I Pinner on 2 September 2019 when he was shown the CCTV footage of the Potters Bar incident. I accept his evidence that having seen this footage he agreed with T/I Pinner that it was clear that there had been no contact between Male 1 and the claimant which was at odds with an allegation of physical assault. This is consistent with an email he sent to T/I Pinner later that day, about arranging a meeting with the claimant, when he wrote "...I can only apologise for Lindsey's actions" [B92].
36. The next day, on 3 September 2019, T/I Pinner spoke to the claimant in relation to her complaint about the incident on 17 August (she remained

unaware of his involvement in relation to the Potters Bar incident investigation). In his investigation report, dated 8 October 2019, T/I Pinner found that the claimant's complaints were not upheld and this was the outcome determined on 10 October by the "Appropriate Authority Decision" maker. The claimant submitted an appeal against these findings and this determination on 5 November.

Debrief with T/I Pinner on 24 September 2019

37. The claimant received a message via Facebook from her team leader, Richard Bark, on 23 September 2019, about a meeting with Mr Chapman the next day. It is agreed that when she telephoned Mr Chapman that evening and the next morning he refused to confirm the purpose of this meeting but told her that a BTP officer would be present and she was required to attend. He was acting on T/I Pinner's instructions. In his subsequent investigation report, Mr Chapman referred to this as a debrief meeting. I find that the purpose of this meeting was to enable T/I Pinner to feedback his concerns about the claimant's conduct and was not part of any investigation process conducted by the respondent or the BTP. This was underlined by T/I Pinner in an email dated 29 October [B135]:

"my role at the meeting was to assist in the showing of the CCTV and to try and impart my disappointment that Lindsey had been dishonest in her statement, and the impact that has on the relationship between rail staff and the BTP."

38. When the claimant met with Mr Chapman and T/I Pinner she accompanied by her union representative. T/I Pinner led this meeting. The CCTV footage was replayed and T/I Pinner read out parts of the claimant's MG11. The incident at the gateline took between 4-6 seconds. T/I Pinner told her that the footage showed there was "clear daylight" between Male 1 and her and there was no physical contact. The claimant understood that she was being called a liar. T/I Pinner told the claimant that Male 1 had been detained. I accept the claimant's evidence that T/I Pinner conveyed that this had been "for no good reason" because Mr Chapman was unable to recollect or deny this incident and this comment is wholly consistent with T/I Pinner's view that the claimant's false allegation had resulted in an investigation and the extended detention of Male 1. T/I Pinner also told the claimant that Male 1 had died. Although I accept the claimant's evidence that she felt that T/I Pinner was making such a link, I do not find that he implied that this had anything to do with the claimant. The claimant told T/I Pinner that she had not wanted Male 1 to get arrested and she had been asked by the BTP officers to provide a statement so that they could "tag the assault to the offences". T/I Pinner warned the claimant that he had considered interviewing her under caution in relation to an allegation that she had perverted the course of justice but decided that this was not in the public interest.

39. He emailed Mr Chapman later that day to thank him for his time and the use of an office when he reiterated his concerns about the claimant's actions in unequivocal terms [B132-4]. He highlighted the following extracts from the claimant's MG11:

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“Male 1 then proceeded to push through the wide aisle gate and came towards me and barged me with his right shoulder and used force to ensure that I was out of his way. The force of the barge made me step back and he made contact with my right shoulder. He deliberately barged me out of the way to get through and changed his body stance to make contact with me. He did not need to make contact with me and I gave him no permission to assault me...”

“I was upset and shocked at Male 1 barging me, I am only trying to do my job and do not need to get assaulted...I understand that what I say may be used in various ways and it may be disclosed to the defence. The incident has made me feel nervous doing my job. I am only trying to conduct my day to day duties and don't expect the rudeness and for things to get physical. Although it was not a major assault the fact Male 1 felt he could barge me and for that to be ok is unacceptable.”

T/I Pinner emphasised that in signing this statement the claimant knew that she would be liable for prosecution “if she had wilfully stated anything that she knew to be false, or did not believe to be true.” He confirmed that Male 1 had been detained for six hours when he denied the assault and asserted that the claimant had made it up. He explained that the investigating officer had reviewed the CCTV footage and had asked him to look at it and he concluded that

“At no stage is contact made between the suspect male and Ms HUXLEY, she actively approaches the barrier line as the two males approach it and acts as a barrier, they both push through the barrier but Ms. Huxley steps away before contact is made, the suspect male does not strike her with his right shoulder, nor changes his body stance, nor used any force upon her person.”

He had also reviewed the MG11 statement provided by Ms Murphy in which she said that the claimant had told the BTP on the train to Finsbury Park that Male 1 had “assaulted her by pushing past her. I then asked her if he had assaulted her and she told me she had.” T/I Pinner explained that

“the biggest issue for me is that the statement and the CCTV are fairly different...regarding the movement of the suspect and the fact that she was pushed back and alarmed by the incident...the CCTV clearly shows no assault, and that she actively pursued the suspect through the station after the incidents.”

He highlighted that the claimant had had several opportunities to withdraw her allegation. Amplifying the comments made in his email dated 27 August 2019 in relation to “suitable action”, T/I Pinner concluded that an interview under caution was unnecessary and that a sanction by the respondent

“would be more effective, whether that be dismissal, removal from current role, or movement to a non-public facing role, however, it would be highly inappropriate for me to comment on that or for that to influence any part of your company's decision going forward.”

T/I Pinner explained that he would now need to review all calls made by the claimant to the BTP and any convictions which had resulted from any

statements she had given. He reiterated that BTP officers needed to be able to trust the integrity of incident reporting by train operating staff with the obvious implication that the claimant's actions had undermined this trust. Although I find that T/I Pinner was recommending that the respondent took disciplinary action in relation to the claimant, I do not find that he was recommending her dismissal. As his email made clear, this was a decision to be made by the respondent and dismissal was only one of the available options. Further, whilst I also find that this influenced the decision which the respondent took to investigate the claimant, I find that this was reasonable because T/I Pinner had raised credible and potential serious concerns about the claimant's conduct.

40. On her way home and evidently distressed by this meeting, the claimant ran into PCSO Fayaz Ahmed. PCSO Ahmed emailed T/I Chapman the following morning [B89] to report that the claimant had told him she had been assaulted, T/I Pinner had threatened her and she feared that she was going to be prosecuted for wasting police time, she had been told that she had caused the young man's death, and she was worried about losing her job. Notably, he wrote "she ended up in tears but this isn't the first time she has cried like this over fare evaders...and I have dealt with her many calls many times where she over reacts to get a response from BTP". T/I Pinner forwarded this email to Mr Chapman when he complained [B88]:

"This is completely unacceptable behaviour from Lindsey, clearly she was upset, but this is not what has happened at all.

Please can you instruct her not to discuss this incident any further, and if she does, perhaps with a tad more honesty!"

The investigation by Mr Chapman

41. The claimant was suspended the next day pending an investigation by Mr Chapman under section 7 of the respondent's Disciplinary Procedure. In writing to confirm this, Mr Chapman explained that this decision had been taken [B100-1]:

"as a result of an allegation of you falsely reporting a physical assault at Potters Bar on 24th June 2019 and subsequent discussion on the matter on Tuesday 24th September 2019 with Inspector Gary Pinner of the British Transport Police".

This decision was taken by Mr Chapman together with Emma Devine, HR Business Partner (Great Northern).

42. Mr Chapman interviewed Ms Murphy on 22 October 2019. I find that the record of this interview [B138] is accurate save for the content of the final question which Mr Chapman put to Ms Murphy because this was the only correction she made in her witness statement to the tribunal and save for this omission she agreed when giving oral evidence that she had no reason to doubt the accuracy of this record. When interviewed by Mr Chapman, Ms Murphy confirmed that the claimant: told her that "she had been pushed by a youth" when she called her on 24 June; identified "the one who had barged into her" when she joined her on the platform at Potter Bar Station; was asked by the BTP officer at Finsbury Park Station

“to confirm she had been assaulted”, had expressed her reluctance to pursue this and

“I told her that if they barged into her then they needed to be dealt with for the assault as well...[and] if she was assaulted then she should pursue it. We don't come to work to be assaulted.”

Ms Murphy therefore confirmed that the claimant had told her that she had been “pushed” and “barged” by Male 1, and that she and the BTP understood that the claimant had alleged that she had been physically assaulted.

43. The claimant attended an investigatory meeting with Mr Chapman on 24 October 2019 when she was accompanied by her RMT representative [B124-31]. Mr Chapman explained that the reason for this investigation was that the BTP had told him that an assault had not taken place as the claimant had described in her MG11 and he was concerned that that statement could bring the company into disrepute. He confirmed that the BTP were now reviewing the statements she had given in relation to other cases. Mr Chapman referred to the MG11 extracts which T/I Pinner had highlighted and disclosed. The claimant said that she still stood by her statement “I believe he touched me, and I made that step back”. Mr Chapman asked the claimant about the CCTV footage. The claimant maintained that she had not made a false statement and said:

“I told it from what I believed to of happened, and looking at common assault, common assault did occur, even if there was no physical contact”.

Putting T/I Pinner's statement to her that there was no contact or any force used, the claimant maintained that there had been contact.

44. The claimant said that she agreed to give a statement to the BTP because she was told by the police officer that it would help them. She explained:

“I believe I was barged, and Kelsey said that was assault. The police officer said that would add more weight, but I wasn't keen”.

The claimant said that she used the words “connected with my shoulder” and when she explained that Male 1 “made contact and I stepped back” the police officer described this as a “barge”. She agreed that she signed the statement and did not correct it.

45. The claimant's position was contradictory and equivocal in that: she was alleging that there was a common assault in the absence of any contact and also maintained that there had been physical contact; she alleged that the BTP had suggested the use of the word “barged” whilst also agreeing that she believed that she had been barged; she also appeared to be deflecting responsibility for the allegation she had made onto Ms Murphy and the BTP; and she stood by the signed statement she had given to the BTP. At the end of this meeting, the claimant's representative conceded that there was a “slight difference” between what the footage showed and what the claimant believed happened at the time of the incident and that “going forward the trust [with the BTP] is going to be very difficult”.

46. Mr Chapman then contacted T/I Pinner with some further questions. T/I Pinner confirmed his responses by email on 29 October 2019, under four numbered paragraphs [B135]. Although the queries which Mr Chapman had raised with T/I Pinner were not disclosed, looking at this email, I do not find that his intention was to bolster the case against the claimant, as is contended, but to obtain limited clarification. T/I Pinner confirmed that the CCTV footage was viewed from two angles on 24 September. He described that meeting as a “debrief”. In relation to PCSO Ahmed’s email, the veracity of which the claimant had challenged, T/I Pinner stated that he would be “exceptionally surprised” if PCSO Ahmed had lied.
47. Mr Chapman completed his investigation on 31 October 2019. In his report, he concluded that the allegation of physical assault which the claimant had made “was shown to be untrue in content” [B122]. Although Mr Chapman accepted the representations made by T/I Pinner, I find that he formed his own view that the excerpts of the claimant’s MG11 were inconsistent with the CCTV footage in relation to the allegations made by the claimant and she had failed to explain these discrepancies. Another factor was that he felt the claimant had exaggerated in the past. Mr Chapman also relied on the responses which the claimant had given during the investigatory interview which I have found were equivocal and contradictory. He also reiterated T/I Pinner’s contention that the claimant had had several opportunities to amend or withdraw her allegation. Mr Chapman also accepted T/I Pinner’s broader concern in relation to the integrity of incident reporting and the need for trust between the BTP and the respondent. I accept his evidence that this trust was paramount: the respondent’s staff needed to have confidence that BTP would take complaints of assault seriously and go on to take appropriate action, and, equally, BTP officers needed to have confidence that the complaints which were made were accurate, true and proportionate. The claimant’s representative had conceded that her actions had undermined this trust. Based on his findings, Mr Chapman recommended that the claimant faced a charge of gross misconduct.
48. Mr Chapman’s report included the excerpts of the claimant’s MG11 which T/I Pinner had taken issue with and the following five appendices: the notes of the interviews conducted with the claimant and Ms Murphy, T/I Pinner’s correspondence of 24 September and 29 October 2019; and the email from PCSO Ahmed. It did not include T/I Pinner’s initial email dated 27 August 2019.
49. Having found that there was a case to answer, Karen Sherwin, Station Manager, was asked by Ms Devine to conduct the disciplinary hearing when she summarised the conclusion of Mr Chapman’s investigation:

“Gary has just completed an investigation into an incident involving Lindsay Huxley. Lindsay made an allegation of assault, BTP investigated and it’s apparent that the allegation was factually incorrect.”

Notwithstanding this summary, as I find below, Ms Sherwin came to her own view in relation to the claimant’s conduct based on the evidence she considered.

The claimant's complaints about T/I Pinner

50. By this date, the claimant had complained about T/I Pinner's conduct of the meeting on 17 August 2019 to the BTP, on 24 September 2019, and to the Professional Standards Department ("PSD"), on 8 October. The latter complaint was investigated by Chief Inspector ("CI") Young. In his report, dated 17 January 2020, CI Young confirmed that: he had met with the claimant and her solicitor when it was accepted by them that the original complaint that there had been an unlawful interview on 17 August 2019 was unfounded and they had queried whether T/I Pinner had contravened the GDPR when he had disclosed excerpts of the claimant's MG11 to the respondent; the outcome of this investigation was that the allegation was not upheld; and also that [C/A54]

"Having reviewed the CCTV evidence, I would concur that the inconsistencies between Miss Huxley's statement and what is seen on CCTV are considerable and the matter could alternatively have been subject to formal police investigation and referral to the CPS. I would however agree that the GTR internal discipline process represented an appropriate and proportionate way of dealing with this matter in the public interest."

51. As noted above, the claimant also challenged the findings of T/I Pinner's investigation report in relation to her complaint about the incident on 17 August 2019. This appeal was partially upheld by the PSD on 27 February 2020 on the basis that there had been a failure to investigate one discrepancy, however, the overall finding was that neither this omission nor other discrepancies which were identified in T/I Pinner's report had undermined the conclusions of the report or of the determining officer.
52. These outcomes were concluded after the claimant's appeal against dismissal was determined and were not considered by the respondent during the disciplinary and appeal process.

The disciplinary hearing on 13 November 2019

53. The claimant was invited to a disciplinary hearing on 13 November 2019 by letter dated 4 November [B139] which was sent by email two days later [B90]. This claimant was told that further to Mr Chapman's investigation she had been charged with the following allegation of gross misconduct under clause 9 of the Disciplinary Procedure:

"That on 24 June 2019, you reported that a passenger physically assaulted you. That was subsequently shown to be factually incorrect."

The claimant was warned that this hearing could result in her dismissal. She was reminded of her right to bring a companion.

54. She requested a copy of the disciplinary pack on 6 and 8 November 2019 which Ms Sherwin emailed to her at 1.37pm on 11 November. This was the first time she received Mr Chapman's investigation report and appendices.

55. The claimant was due to meet with CI Young on 20 November 2019 in relation to one set of her complaints about T/I Pinner. When she requested, through her RMT representative, John Stanford, that the disciplinary hearing was postponed until after this date, Ms Devine asked for written confirmation of this meeting. CI Young emailed Ms Devine on 12 November to confirm that he was meeting the claimant the following week to discuss her complaint and explained "If the complaint is upheld – this may be relevant to your disciplinary meeting" [B140]. Ms Devine emailed the claimant to confirm that the meeting would go ahead. I accept Ms Sherwin's unchallenged evidence that she did not see and was not told about this correspondence.
56. The disciplinary hearing on 13 November 2019 took over four hours, with adjournments [B143-151]. Ms Sherwin was assisted by a note-taker and the claimant was accompanied by Mr Stanford.
57. At the start of the hearing, Ms Sherwin ensured that the claimant and Mr Stanford had the same paperwork she had. Neither included the email of 24 August 2019 and I accept Ms Sherwin's evidence that she had not seen this correspondence. Ms Sherwin asked whether the claimant needed time to read through any of the paperwork. Mr Stanford declined this offer. Although Mr Stanford's evidence was that he took this decision based on his experience as a trade union official that the respondent's managers routinely refused to allow time to read and would threaten to proceed in absentia if an adjournment was requested, he was unable to recall whether Ms Sherwin had ever done this, and there was no evidence to suggest, and I do not find, that Ms Sherwin would have refused to allow the claimant additional time to review the paperwork had this been requested. Ms Sherwin had offered this facility and it was declined. I therefore find that whilst the claimant was not given seven days to review this paperwork, she declined the opportunity to spend more time with her representative to familiarise herself with the documents and to prepare for the hearing, if this was required. Nor did she or Mr Stanford indicate to Ms Sherwin that they were underprepared or at any disadvantage because of the limited time they had had to review the investigation pack. As Mr Stanford subsequently stated at the appeal hearing, he anticipated that the claimant would be given a severe reprimand and therefore felt the best approach was to proceed.
58. The hearing was adjourned for 15 minutes to enable the claimant and Mr Stanford to watch the CCTV footage. The claimant recorded this footage on her personal phone.
59. When the hearing resumed, Mr Stanford complained that T/I Pinner had unduly influenced Mr Chapman's investigation and had called for the claimant to be dismissed. Ms Sherwin disagreed noting that this was a serious issue because the BTP could have charged the claimant with perverting the course of justice instead of referring this to the respondent to deal with through their internal procedures.
60. Ms Sherwin confirmed that her focus was the MG11 extracts which had been provided by the BTP and the CCTV footage. She emphasised that the essence of the disciplinary charge against the claimant was that the

MG11 stated “physical contact with my right shoulder”. This was the basis on which the claimant had made the allegation of physical assault. Ms Sherwin disagreed with Mr Stanford that the claimant’s account based on the excerpts was either true or factual. She challenged the claimant’s allegation that she had been “pushed” and also her repeated use of “barge”. The claimant said that the BTP officer had suggested the word “barge” when she took her statement although she conceded, when reminded of Ms Murphy’s evidence, that she had used the words “barged” and “pushed” to describe the incident to Ms Murphy. Ms Sherwin pointed out that the claimant had willingly given her statement and had signed it. Mr Stanford asserted that the statement was based on the claimant’s honest belief. He accepted that the claimant had had the opportunity to withdraw her statement on several occasions but had not done so because she felt “she was in the right”. As he went on to say, the claimant had made her statement and had “stuck by it”.

61. In relation to the contact which could be seen from the CCTV footage, Mr Stanford suggested that whilst the BTP had decided, based on this footage, that there was no case to answer against Male 1, it showed that there had been an assault in that the claimant had apprehended an attack. This was not what the claimant had alleged in the MG11. It was agreed that the CCTV showed that the claimant and Male 1 were in close proximity before the claimant stepped back. Mr Stanford also said the footage showed a “touch” once the men had gone through the barrier. He later suggested that the footage showed “slight” contact. When Ms Sherwin said that this was not at shoulder level, the claimant said that she believed that contact was made in the chest area but as she was wearing a bag it was possible that the contact was made elsewhere. Ms Sherwin reminded the claimant that this was at variance with her signed statement. She asked the claimant whether she was now saying that she was not assaulted. The claimant did not answer the question.
62. The claimant suggested that she replayed the footage on her phone whereupon Ms Sherwin instructed her to delete this material from her device. Mr Stanford and the claimant suggested another look at the footage to see whether there was any contact which Ms Sherwin refused on the basis that this was unnecessary because she had watched the footage. She had not watched it in segments, or in freeze-frames and nor were stills procured by the respondent. Her oral evidence was that having viewed the footage in real time she was satisfied that there was clear daylight between the claimant and Male 1 at all times and no contact was made. When Ms Sherwin was shown the footage frame by frame during cross-examination, she maintained that there was no contact, although at one frame shown at the 15 seconds mark, she agreed that this was not clear. When she was shown a series of stills covering a 10-second period, she agreed that in four stills there was no clear daylight and in a fifth there was a crack of daylight at chest level and no daylight at hand level; and she also agreed that viewing the evidence in this format, it was not clear either way whether there had been any physical contact. However, I find that the focus for Ms Sherwin when she had conduct of the disciplinary hearing was not whether there had been any contact between the claimant and Male 1 but whether the footage showed that there was a physical assault in the terms which the claimant had alleged. This was also

consistent with the terms of the disciplinary charge she was required to determine. She told the claimant and Mr Stanford that the footage did not show that “that assault” – by which I find that she was referring to the specific features of the physical assault alleged – had taken place. I find that she had reasonable grounds for this conclusion because of the observations I have made in relation to the same footage.

63. The claimant said that it had not been her intention to report an assault but she did so “to back up the statement for the fails”. When she was asked a second time if she still believed an assault had taken place, the claimant did not respond, but Mr Stanford said it was not disputed that she had made the statement and “she stuck by it” and he went on to say that she “had stuck to her guns three times”. Ms Sherwin therefore concluded that it was clear that the claimant stood by her statement and denied that she had given a false statement, even though she had said the contact could have been her chest and not her shoulder and Mr Stanford had referred to a “touch” and “slight contact”, neither stated that the CCTV showed that Male 1 had barged her with his shoulder; the claimant’s evidence was also that the BTP officer had suggested the word “barged” although she agreed that she had used this word and “pushed” to describe the incident to Ms Murphy. The claimant’s evidence was once again contradictory and equivocal. Ms Sherwin concluded:

“I have an extract of a statement which does not match the CCTV. I do not feel an assault took place. I believe the first part of the incident was where you try to block them on the gate line, it was a close interaction and we would not encourage that.”

64. In relation to the evidence she relied on, Ms Sherwin told the claimant that:

“we have heavily relied on the evidence from the BTP and we would expect them to be reliable and honest, hence the relationship we have with the BTP.”

I find, by reference to Ms Sherwin’s oral evidence and the record of the disciplinary hearing, that this evidence was the MG11 extracts, the CCTV footage and also T/I Pinner’s opinion that the claimant had made a false allegation. However, I also find that, like Mr Chapman, Ms Sherwin gave weight to this opinion but made her own assessment and concluded that the MG11 extracts and the footage were fundamentally irreconcilable. The commentary from T/I Pinner in the investigation pack reinforced her belief that the claimant had made a false allegation because on her own viewing the CCTV did not show there had been a physical assault and the claimant’s evidence in relation to the discrepancies was equivocal and contradictory.

65. When Mr Stanford complained that only excerpts of the MG11 were being relied on, Ms Sherwin emphasised that her focus was on the words which had been highlighted and which the claimant had not denied. If Mr Stanford was asserting that the claimant’s words were being taken out of context he was not in a position to substantiate this complaint in the absence of the complete statement. However, he was unable to substantiate this assertion during his oral evidence with reference to the complete MG11 in the bundle.

66. Ms Sherwin also said the respondent took BTP's allegation that the claimant had made a false allegation very seriously. The claimant had brought the claimant into disrepute. She referred to T/I Pinner's disappointment that the claimant had been dishonest in making her statement and this had affected the relationship between BTP and the respondent. Mr Stanford retorted that the claimant was a heroine, she had been doing her job to protect revenue. The claimant referred to her complaints about the BTP and T/I Pinner and alleged that he had pursued this allegation to discredit her because of these complaints. Ms Sherwin told the claimant that this was outside the scope of the hearing. She also noted that the initial concern about the MG11 was raised by the investigating officer and not T/I Pinner. When Mr Stanford complained that Mr Chapman had referred to historic "offences" relating to the claimant, Ms Sherwin confirmed that she had not taken this into account. Her focus was therefore the charge of gross misconduct relating to the incident on 24 June 2019. Ms Sherwin also queried why the claimant had put herself in danger against the respondent's by blocking the gateline and following the men up to platform. She said this went against the respondent's procedures and training. She invited the claimant to consider whether she would act differently in the same circumstances and the claimant said she would let the men go through the barrier and deal with them on the platform.

67. Following an adjournment, Ms Sherwin confirmed her decision to dismiss the claimant with immediate effect. She concluded that the claimant had made a false allegation. This had potentially damaged the respondent's relationship with the BTP. The claimant had also put herself in danger. I accept Ms Sherwin's oral evidence that she found that this was a case of gross misconduct because the claimant had lied when she alleged she had been physically assaulted. During re-examination, Ms Sherwin said that she found the following excerpts of the MG11 to be inaccurate:

"Male 1...barged me with his right shoulder and used force to ensure I was out of his way. The force of the barge made me step back and he made contact on my right shoulder. He deliberately barged me out the way to get through and changed his body stance to make contact with me."

I find that this was something which Ms Sherwin considered at the time. As the record of the hearing shows, she was focused on the specific elements of the claimant's allegation of assault i.e. that there had been physical contact from Male 1 in the form of a shoulder barge to her right shoulder. As the appeal manager went on to find, the claimant had told a story i.e. a narrative that she had been physically assaulted. The details of the narrative which the claimant had given, and stood by, were relevant to Ms Sherwin's assessment as was the context in which the incident had taken place.

68. Ms Sherwin wrote to the claimant the following day to confirm this decision [B154]. She concluded "The CCTV footage clearly shows that no physical assault happened." She set out the following six factors which she had taken into account to apply the sanction of dismissal:

- (1) The CCTV showed that the physical assault the claimant had reported had not happened.
- (2) The CCTV also showed that the claimant had attempted to “block the way” of the passenger which had put her in danger.
- (3) She had actively followed the passenger up to the platform.
- (4) She signed the MG11 stating that a physical assault had taken place in the knowledge that she would be liable for prosecution if the statement was proven to be false.
- (5) She failed to take the opportunity she had to retract her statement.
- (6) It was imperative that staff were honest when reporting assaults. The reporting of false allegations could potentially impact on the relationship between the respondent and the BTP.

I accept Ms Sherwin’s oral evidence that these were factors which she considered solely in relation to the sanction to be applied having found that the charge of gross misconduct was made out. The claimant says that factors (2) and (3) were new matters which were not put to the claimant and she was not therefore given the opportunity to state her case in full. I do not accept that these were treated as allegations in themselves or as an intermediate category i.e. neither background matters nor allegations, as the claimant contends. The underlying facts in relation to (2) and (3) were raised by Ms Sherwin during the hearing and the claimant was given an opportunity to address them. I find that Ms Sherwin was reasonably entitled to give weight to all of these factors when deciding on an appropriate sanction. Ms Sherwin found that the claimant had blocked Male 1 at the gateline instead of stepping aside and the altercation and brush past had resulted from that. She had followed the youths up to the platform. She had put herself in harm’s way. Ms Sherwin also concluded that the claimant had had the time and opportunity, including during the adjournment when she had reviewed the CCTV footage with Mr Stanford, to reflect upon and retract the allegation of physical assault she had made which Ms Sherwin found to be unsustainable. She also concluded that the claimant’s conduct had the potential to impact on the relationship with the BTP, something which the claimant’s representative had conceded at the investigation meeting.

The appeal

69. The claimant appealed against the decision to dismiss her on 18 November 2019 [B156] on the following three grounds: (i) the respondent had contravened the Disciplinary Policy when it failed to provide her with the investigation pack a minimum of seven days before the disciplinary hearing; (ii) she challenged the “legality and source” of the evidence provided by the BTP which she said prevented “a wholly unbiased investigation” and influenced the outcome which had been “disproportionately harsh”; and (iii) any historical sanctions which had been applied to her were not relevant and should not have been cited.
70. Ms Devine asked Karen Gregson, Area Stations Manager, to conduct the claimant’s appeal. She was provided with the same documents which Ms Sherwin had considered and it is also likely that she was provided with the respondent’s record of the disciplinary hearing and the dismissal outcome letter. I accept her unchallenged evidence that in preparation for the

appeal hearing, she spent some time reviewing the CCTV footage because she could not see where a physical assault had taken place and having reviewed the evidence was also concerned that the claimant had put herself at risk by pursuing the youths onto the platform. Although the appeal was a review and not a rehearing, Ms Gregson therefore conducted her own assessment of the evidence which Ms Sherwin had relied on to dismiss the claimant i.e. by comparing the claimant's allegation as set out in the MG11 extracts with the footage.

71. The appeal hearing took place on 7 January 2020 when Ms Gregson was supported by a note-taker and the claimant was again accompanied by Mr Stanford [B162-9]. When the claimant referred to her complaint to the PSD about T/I Pinner, and her complaints about the two BTP officers, Ms Gregson told her that these were not relevant to the claimant's grounds of appeal and refused to accept this or any new evidence on the basis that she was required to review the decision which Ms Sherwin had made. Ms Gregson did not therefore review:

- (1) A second statement which Ms Murphy had provided in which she said: when she told the claimant to report the incident at Potters Bar to the police the claimant had replied that "it wasn't a massive push and she was concerned about getting into trouble because she had blocked the gate"; when one of the BTP officers at Finsbury Park station asked them both "who was assaulted?" the claimant confirmed it was her. This statement omitted any reference to the word "barge". I find that it is likely that this omission was deliberate because Ms Murphy agreed in oral evidence that she discussed the contents of this statement with the claimant who now understood the significance of this word in the context of the assault allegation and she was unable to explain this omission which contradicted the evidence she had given Mr Chapman during his investigation.
- (2) A screenshot of the CCTV footage which the claimant had recorded on her phone and had not deleted but instead forwarded to a third party.

72. Ms Gregson made clear that the crux of the allegation was the discrepancy between the claimant's statement that there had been a shoulder barge and the CCTV footage. She added that this was not just one or two words which the claimant had used but about her description of an assault which could have led to criminal proceedings:

"The words in there, whether we change one or two, take the word situation out, if you look at that it is not just the word barge, shoulder contact, stepping in and pushing you back, that is telling me a story that you have been assaulted."

Ms Gregson was also concerned that the claimant had put herself in danger by following the youths up the ramp to the platform.

73. The claimant said she had not written the MG11, the BTP had written it for her. She said she had used the word "pushed" and the BTP officer suggested "barged and I was like yeah alright". The claimant was unable to explain why she had signed a statement if she had not agreed to its content.

74. After a lengthy adjournment during which she reviewed the CCTV footage, Ms Gregson confirmed her decision to dismiss the appeal. She emphasised that the claimant had put herself in an “unnecessary situation” which she could not condone. In relation to the first two grounds of appeal, Ms Gregson said that if the claimant had had major concerns about this then she should have stopped the disciplinary hearing; as to the third ground, Ms Gregson found that this had not been substantiated. This outcome was confirmed in writing, on 16 January 2020, when Ms Gregson wrote [B72]:

“... I upheld the decision made by Karen Sherwin in that in accordance with GTR policies and procedures you were dismissed following gross misconduct charges. Those charges related to bringing the company into disrepute in that your [sic] signed a detailed statement of events that did not concur with the CCTV footage.

I confirmed in the summing up the reasons for the decision although you claim that a BTP officer wrote the statement you still signed this document which he believed to be the truth. Having viewed the CCTV myself and reviewed in full the details relating to both the investigation and the hearing I conclude that I agreed with my colleagues and could not find any issues with decisions made.”

I accept Ms Gregson’s evidence which is consistent with the record of the appeal hearing and her outcome letter that she was satisfied that the claimant had been dismissed because she had given a false statement to the BTP, this showed a lack of honesty and potentially damaged the relationship with the BTP, and she had also put herself at risk.

Conclusions

Did the respondent believe that the claimant had committed the misconduct in question?

75. Although it is not necessary to make a finding on this, as the claimant agrees that the respondent held the requisite genuine belief, I would have found that the respondent did believe that claimant’s actions amounted to misconduct. T/I Pinner raised serious and credible concerns about the claimant’s conduct which warranted investigation and at each stage of investigation, disciplinary and appeal process the relevant managers were satisfied that there was a significant variance between the excerpts of the claimant’s MG11 and the CCTV footage, and that the claimant had made a false allegation that she had physically assaulted.

Did the respondent have reasonable grounds for holding that belief following a reasonable investigation and fair procedure?

76. I find that the respondent’s investigation was within the band of reasonable responses, there was a fair procedure and the respondent had reasonable grounds for holding the belief it had that the claimant had committed the misconduct alleged.

77. I have found that T/I Pinner raised serious and credible concerns about the claimant’s conduct which warranted investigation. The respondent was

required to investigate the allegation of dishonest conduct on its own merits. The essential task for the respondent was to compare the MG11 extracts with the CCTV footage and to consider the degree of consistency between them and if an inconsistency was established to consider whether the claimant had made a false allegation. I have found that at each stage, the relevant manager conducted this exercise and came to their own independent conclusion that the claimant had given a false i.e. dishonest account when she had made an allegation that Male 1 had physically assaulted her. I do not therefore find that the respondent's refusal to consider the claimant's complaints about T/I Pinner renders the investigation unfair because this was not relevant to the enquiry which the respondent undertook with reference to the material under consideration. I find that whilst T/I Pinner's opinion that the claimant had acted dishonestly (and also his recommendation for disciplinary action) carried weight, the conclusions which the respondent reached were made principally by reference to the MG11 extracts and CCTV footage as well as the claimant's own representations.

78. In relation to the format in which the CCTV footage was viewed, although it could have been viewed by using stills or in freeze-frames or segments, I do not find that the respondent acted outside the band of reasonable responses when it viewed the footage as moving images in real time (or that it failed to review this footage with the claimant and her representative). It is relevant that the respondent concluded that there was a significant variance between the facts alleged in the MG11 extracts and the CCTV footage and that at neither dismissal nor appeal hearing did the claimant or Mr Stanford contend that the footage, in whichever format, showed that Male 1 had barged the claimant with his shoulder or any other part of his body.

79. I do not find that the overall process was unfair or, for completeness, that the respondent breached paragraphs 4 and 9 of the ACAS Code of Practice on Disciplinary and Grievance Procedures as is contended by the claimant.

- (1) I have found that the respondent did not act unreasonably in failing to review the CCTV footage in the presence of the claimant and Mr Stanford in the circumstances.
- (2) Nor do I find that the failure to disclose T/I Pinner's email dated 27 August 2019 was unreasonable in the circumstances in which neither Ms Sherwin nor Ms Gregson saw this email, in which I have found that Mr Chapman came to his own independent conclusion that there was a case to answer, in which Ms Sherwin also came to her own independent assessment that the claimant had made a false allegation of physical assault and in which Ms Gregson concluded that the decision to dismiss the claimant was sound, having herself reviewed the material evidence.
- (3) Nor have I found that Ms Sherwin considered other matters when she upheld the allegation of gross misconduct although she did consider the ancillary factors listed in her letter when she determined the sanction to be applied, the relevant facts having been put to the claimant during the disciplinary hearing, which I have found to be reasonable.

- (4) Nor do I find that the delay in providing the investigation pack to the claimant rendered the process unfair in the circumstances in which neither the claimant nor her representative took the opportunity to take the adjournment offered, or sought a postponement on the basis of this late disclosure, nor asserted that this had put the claimant to any material prejudice.
- (5) Nor for the reasons set out below do I find that the failure to consider whether the claimant would accept the lesser sanction of a reprimand or warning made this process unfair in the circumstances.

80. The respondent had reasonable grounds for holding the belief that the claimant had falsely alleged that she had been physically assaulted which it was not required to establish was beyond reasonable doubt but on the balance of probabilities.

- (1) Ms Sherwin was satisfied that the CCTV footage did not show that the claimant had been physically assaulted and, specifically, that Male 1 had shoulder barged her and made contact with her right shoulder which was the essence of the claimant's allegation. I have found that she had reasonable grounds for this conclusion based on my own observation of the footage.
- (2) Neither the claimant nor her representatives contradicted this. At both the investigation meeting and disciplinary hearing, the claimant and Mr Stanford, respectively, referred to the fear of attack i.e. assault which was not what the claimant had alleged in the MG11; at the investigation meeting, the claimant's representative conceded that there was a "slight difference" between the CCTV footage and MG11 extracts; at the disciplinary hearing, Mr Stanford suggested that the footage showed a "touch" and "slight contact", and the claimant said that there was contact at chest level.
- (3) The claimant's evidence was contradictory and equivocal, for the reasons already given, and she adopted the following positions which were fundamentally irreconcilable, which showed that her credibility was at issue: she and/or Mr Stanford asserted that the MG11 was materially inaccurate and she alleged that the BTP had misrepresented her account of the incident and yet she also said that the statement which she had signed represented her honest belief at the time, and stood by its content and her allegation of a physical assault by means of a shoulder barge.
- (4) Given the variance found between the MG11 extracts and the CCTV footage, the claimant's evidence and the representations made by or on her behalf, Ms Sherwin had reasonable grounds for concluding, on the balance of probabilities, that the claimant had acted dishonestly in making a false allegation of physical assault against Male 1.

Was the decision to dismiss the claimant within the band of reasonable responses?

81. Having found that the respondent formed a genuine and reasonable belief in the claimant's misconduct, founded on a reasonable investigation and

fair process, I also find that the decision to dismiss her because of this conduct was within the band of reasonable responses:

- (1) The claimant's conduct was found to be dishonest.
- (2) The circumstances of this dishonest conduct were that the claimant was found to have given a false statement to the BTP which she knew would be used to investigate and potentially to prosecute Male 1 for a violent offence and she had done so without heeding the threat of prosecution for making a false statement.
- (3) More generally, she was in a position of trust and in a role in which she was required to report potential criminal offences to the police and, where necessary, to give statements for use in criminal proceedings. She knew that she was required to provide a true and accurate account when giving a statement to the police.
- (4) The claimant was found to have potentially damaged the respondent's relationship with the BTP and to have brought the respondent into disrepute. Her conduct had impacted on the integrity of incident reporting to the BTP. T/I Pinner had confirmed that a review of the previous statements which the claimant had made was needed. As the claimant's representative had conceded at the investigatory meeting, "going forward the trust is going to be very difficult".
- (5) The claimant did not retract her statement. She stood by her statement when the respondent found she had had sufficient time and opportunity to review and reflect upon its content and the CCTV footage. She also sought to deflect the responsibility for making an allegation of physical assault onto Ms Murphy and the BTP officer who had taken her statement.
- (6) The incident had arisen in circumstances in which the claimant had put herself at risk by blocking the gateline and also by following the youths up to the platform.
- (7) The respondent's trust and confidence in the claimant was gone.
- (8) Ms Sherwin did not ask the claimant whether she would abide by a warning instead of dismissal. However, I do not find that this renders the dismissal unfair i.e. outside the band of reasonable responses in these circumstances.

82. For these reasons I find that the claim for unfair dismissal fails and is dismissed.

83. Finally, I would like to apologise to the parties for my delay in promulgating this judgment.

Employment Judge Khan

17.12.21

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.19/12/2021..

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FOR EMPLOYMENT TRIBUNALS