EMPLOYMENT TRIBUNALS

Claimant: Adrian Chambers

Respondent: Govia Thameslink Railway Limited

Heard at: London South (by CVP) **On:** **16 June 2022, 19-21 October 2022**

Before: Employment Judge Kumar

Representation
Claimant: Mr Toms (Counsel)
Respondent: Mr Mathur (Counsel)

JUDGMENT having been sent to the parties on ***25 October 2022*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Hearing

1. The hearing was heard by CVP over four days on 16 June 2022 and 19, 20, 21 October 2022.

2. On behalf of the respondent I heard evidence from Ms L Waghorn, Driver Manager and from Mr S Bott, Area Operations Manager, the claimant and from Mr J Turner, the claimant's union representative. During the hearing I was referred to documents contained within an agreed bundle and an additional document, a photograph of a safety notice, was provided to me on the first day of evidence. At the conclusion of the evidence I received written submissions and heard oral submissions from counsel for the respondent, Mr Mathur, and counsel for the claimant, Mr Toms.

The Issues

3. At the outset of the hearing in June I identified and agreed the issues to be determined with the parties. It was confirmed on behalf of the claimant that the claim for unlawful deduction from wages was not pursued.

4. The agreed issues were:

   (1) What was the reason or principal reason for dismissal? The respondent said the reason was conduct. The claimant accepted the reason for his dismissal was misconduct and that this is a potentially fair reason.

   (2) If the reason was misconduct, applying Section 98(4) of the Employment Rights Act 1996 and the **Burchell** principles did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

      (a) Did the respondent carry out as much investigation into the alleged misconduct as was reasonable in the circumstances including following a fair procedure?

      (b) Did the respondent have reasonable grounds for concluding the claimant was guilty of misconduct?

      (c) Did the respondent have a genuine belief in the claimant's guilt of the alleged misconduct?

      (d) If the respondent was entitled to conclude the claimant was guilty of misconduct, was the sanction of dismissal within the range of responses that could have been considered by a reasonable employer.

   (3) If the claimant's dismissal was unfair, to what extent, if any, should his compensation be reduced to take into account any contributory fault by him.

   (4) Whether the **Polkey** principles applied to limit any compensatory award to a period within which any procedural defects would have been remedied.

5. It was agreed that I would consider liability, but also contributory conduct and **Polkey** and I heard submissions on those points. Any further determination of matters relating to remedy would then follow.

The Findings of Fact Relevant to the Issues

6. Mr Chambers was continuously employed as a train driver by the respondent from 29 April 2002 until his dismissal for gross misconduct on 21 January 2021. He had a clean disciplinary record.

7. The respondent is a train operator. As such it operates in a safety critical environment and health and safety policies and procedures are rigorously enforced and strictly adhered to. The respondent has c.6600 employees.

8. The claimant was dismissed following an incident that took place at Gatwick on 29 July 2020. The claimant was rushing to travel to Three Bridges station and then to make his onwards journey home. On the day in question he was working on a rest day and may have been more tired

than usual, not least because he was under stress and pressure on account of his wife's ill-health.

9. In his rush to travel from Gatwick to Three Bridges the claimant suffered a momentary lapse of judgment whereby he boarded a train that had been dispatched. He did so by pulling the egress leaver to open the door.

10. Prior to pulling the egress lever he had asked the On-Board Supervisor (OBS), Mr Engelbrecht, to open the door to enable him to board the train but Mr Engelbrecht had declined to open the door. Mr Engelbrecht did not however verbally instruct the claimant not to board the train. A member of platform staff, Mr Bailey, who had dispatched the train, saw the claimant trying to board and was not happy with his actions. He was some distance away from the claimant on a noisy platform and did not successfully communicate any verbal instructions to the claimant not to board the train, such that he caught the claimant's attention.

11. Having boarded the train by pulling the egress lever the claimant contacted the driver by the cab-to-cab radio and apologised that he had boarded the train late.

12. The Network Rail rulebook in place at the time of the incident included the following rule at Rule 1.2:

    "*You must not…get on a moving vehicle unless it is absolutely necessary, and then only if you can do so safely*."

13. At the time the claimant boarded the train the train was either not moving at all, although power had been taken, or it had moved ever so slightly, as little as 1.5 inches, a movement that would not be perceptible on CCTV footage. The effect of the claimant pulling the egress lever was that the train jolted before power was re-engaged and the train departed. There were no reports of any third parties being injured or otherwise affected by the jolt and the claimant himself was unharmed.

14. As a result of the incident the claimant was suspended on 30 July 2020 and an investigatory officer Mr Yeates was appointed.

15. There was some delay in conducting interviews, attributed, for the most part, by the respondent to the Covid-19 global pandemic. Platform staff and the OBS were interviewed on 3 September 2020 and the claimant was interviewed on 30 September 2020. The record of the interviews shows that Mr Yeates asked the platform staff and OBS leading questions eliciting responses that supported the alleged misconduct.

16. On 24 November 2020 the claimant was provided with the outcome of the investigation. The claimant was informed that he would be invited to a disciplinary meeting in relation to alleged gross misconduct described as:

    "*on the 29th July 2020 at approximately 1708 you committed an unsafe act by boarding 1J46 at Gatwick Airport after it had been dispatched by staff. This resulted in a dispatch irregularity by disobeying instructions, acting negligently and disregarding rules, regulations and instructions including those contained in the Network Rail rule book, thus affecting the safety of*

the public, other employees and yourself by boarding 1J46 at Gatwick Airport after it had been dispatched by staff.

These offences break the necessary mutual trust that must exist between and [sic] employee and employer."

17. The respondent's disciplinary procedure provided that

"The Disciplinary Officer should give consideration to the following:-

- *The sanction imposed in similar cases in the past.*
- *The employee is not being unfairly singled out.*
- *The employee's disciplinary record (including current warnings of a similar nature), their character, position held and length of service.*
- *Any special circumstances which might make it appropriate to adjust the severity of the sanction.*
- *Whether the proposed sanction is reasonable given all the circumstances.*
- *The case does not warrant a disciplinary sanction and the charge will be withdrawn.*" [page 168 of the bundle]

18. On 22 December 2020 the claimant was invited to a disciplinary meeting which took place on 19 January 2021. The disciplinary meeting therefore took place 6 months after the incident in question. At that meeting the claimant was accompanied by his union representative, Mr Turner. He was informed at that meeting that the outcome of the disciplinary meeting was his dismissal and this subsequently was confirmed in writing.

19. The meeting was chaired by Ms Waghorn who also gave evidence to the tribunal. At the disciplinary meeting the claimant had sought that the respondent consider the outcome of an investigation involving a similar incident which had not resulted in a dismissal. Ms Waghorn confirmed that the disciplinary outcome would be based solely on the case's own merits, taking into account mitigation presented. Ms Waghorn did not agree that the manner in which witnesses were interviewed during the investigatory process was unfair. She concluded that the claimant had been instructed not to board the train by both Mr Engelbrecht and Mr Bailey.

20. On 20 January 2021 the claimant sought to appeal identifying the following grounds:

i) that there were incidents of a similar nature that were not taken into consideration;
ii) that his length of service, previous conduct and character were not considered;
iii) that the hearing officer failed to take into consideration points raised by his representative;
iv) application of the disciplinary policy; and
v) the severity of the punishment/sanctions.

21. The appeal meeting took place on 25 February 2021. Mr Bott, who also gave evidence to the tribunal, conducted the meeting. On that occasion, the claimant was accompanied by union representative, Mr Morris. During the meeting Mr Bott acknowledged that it was not possible to conclude

one hundred percent that the train was moving when the claimant pulled the egress lever.

22. The appeal was dismissed at a further meeting on 3 March 2021. In a letter setting out the outcome of the appeal Mr Bott addressed each of the points raised by the claimant on appeal. Within the letter Mr Bott referenced two incidents of a similar nature that had taken place previously (the one identified by the claimant and a further one) but stated that each case was looked at on its own merit and he was satisfied that dismissal was in keeping with previous case history. He dismissed the relevance of the claimant's service history in the context of gross misconduct where dismissal was a possible outcome without prior warning, as provided for in the respondent's disciplinary procedure. He rejected the claimant's case that points raised by the claimant's representative had not been taken into account and considered the delay in the disciplinary process was not unacceptable in the context of the unprecedented pandemic. In terms of sanction Mr Bott stated he was satisfied that gross misconduct had taken place in that the claimant '*committed an unsafe act, disregarding the safety of the railway, for personal gain*'.

23. The findings that I make relevant to contributory fault and Polkey are as follows:-

23.1 The claimant boarded the train as the train was departing. The train had either not moved or had moved ever so slightly, eg 1.5 inches in total. If the train had moved the claimant was not aware the train was in motion at the time he pulled the lever.

23.2 The claimant did not see that the Body Indicator lights (BIL) were out because it was a bright sunny day which affected the visibility of the lights and because he was rushing. He did not exercise adequate care and attention in ensuring that despatch of the train had not taken place. The pulling of the egress lever and boarding of the train by the claimant was a safety breach.

23.3 The claimant did not engage with the platform staff (which is the conclusion I reached from the evidence overall and in particular from consideration of the CCTV stills which do not show an interaction between the platform staff and the claimant). Mr Bailey, one of the platform staff, had made efforts to try to stop the claimant boarding train but these were not vociferous and he did not shout at the claimant, as would have been expected in the circumstances of a train departing at a busy station. If a verbal instruction was given by Mr Bailey, the claimant did not hear it. Again I find that the claimant in his rush to board the train did not exercise adequate care and attention. He did not identify that Mr Bailey was unhappy that he was trying to board the train after despatch and he should have been more aware of the platform staff in the circumstances.

23.4 Had the claimant not pulled the egress lever the train would have departed. The result of the claimant pulling the lever was that the train was caused to jolt. This sudden movement of the train, caused by the claimant's actions ran the risk of causing a standing passenger on the

train to stumble or fall (although it was not suggested that this occurred). The claimant's actions also risked the claimant himself being injured.

24. The claimant quickly realised the gravity of what he had done which was the reason that he contacted the driver on the cab-to-cab radio and apologised for boarding late.

The Law

25. S98 ERA 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—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
……
(4) In any other case 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.

26. I was guided by the EAT judgment in **British Homes Stores v Burchell 1978 IRLR 379 EAT,** being mindful that the employer must show that he had a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation. I was also guided by the Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt 2003 IRLR 23 CA** that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

27. In accordance with the Employment Appeal Tribunal's guidance in **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**, I was mindful, in reaching my conclusions, not to substitute my own view of what the appropriate sanction should have been for that of the respondent's, but that I should consider whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in the particular circumstances of the case.

28. In approaching the question of contributory fault, I was guided by the principles laid down by the Court of Appeal in **Nelson v BBC (No.2) 1979 IRLR 346 CA**. First, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was

culpable or blameworthy. Second, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy. Third, there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

29. In considering whether the **'Polkey'** principles, laid down by the House of Lords in **Polkey v A E Dayton Services Limited 1987 IRLR 503 HL**, applied to the claimant's dismissal, I was further assisted by the Employment Appeal Tribunal's judgment in **Software 2000 Ltd v Andrews 2007 IRLR 568 EAT** which outlined the five possible outcomes (prior to the repeal of S98A(2) ERA 1996) and allowed for the possibility that a tribunal may decide that employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant that it can be effectively ignored.

30. In addition to these well-known authorities I was referred to other authorities which I have considered and taken into account. In particular I considered the guidance in **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352 and **MBNA Ltd v Jones** EAT/0120/15, in relation to the relevance of disparity of sanctions in cases involving similar misconduct.

The Tribunal's Conclusions

31. My conclusions are as follows:

The reason or principal reason for dismissal

32. The reason for the dismissal was conduct. This was a potentially fair reason for dismissal. This was not disputed by the claimant.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant

33. Reminding myself that it is not my role to substitute my view of what was reasonable and, focusing on the range of reasonable responses open to a reasonable employer in the particular circumstances, I find that that the respondent did not act reasonably in all the circumstances in treating the claimant's conduct as a sufficient reason to dismiss him.

34. Applying the **Burchell** principles the respondent did not form a genuine and reasonable belief that the claimant had committed *all* aspects of the wrongdoing alleged. Further it was not within the reasonable range of responses for the respondent to take no consideration of the claimant's very long service to the respondent and his unblemished record in deciding the appropriateness of sanction. Whilst I accept that there are occasions where the act of misconduct is so serious that these matters may not mitigate against it, at the very least, in the particular circumstances of this case, the respondent should have addressed its mind properly to mitigation. The fact that the respondent did not do so in any meaningful sense renders the decision to dismiss outside the range of reasonable responses open to an employer in those circumstances. In

making this finding I am mindful that the range of reasonable responses is not infinitely wide, **Newbound v Thames Water Utilities Ltd** [2015] IRLR 734.

35. If anything it was evident from both Ms Waghorn's oral evidence and the termination letter that she considered the claimant's long, unblemished service record to be an aggravating feature (in that he would have been well-versed in safety procedures) rather than one to be considered in mitigation and that both she and Mr Bott were not willing to give mitigation meaningful consideration, notwithstanding that there were elements of the evidence of the alleged wrongdoing that were equivocal where a reasonable employer should have considered giving an employee with a long, unblemished service history the benefit of the doubt.

36. In reaching this decision I have considered the disciplinary process as a whole but I draw attention to some specific conclusions.

The investigation, disciplinary and appeal process

37. Neither the investigation, nor the disciplinary and appeal hearings were approached with an entirely open mind. This is evident, for example, from the interviews conducted during the investigation. The manner of questioning in particular in relation to the witnesses interviewed on 3 September 2020 leads me to the conclusion that Mr Yeates had by the time of the interviews reached a conclusion and sought to draw from the witnesses' evidence support for his conclusion. An example of this can be seen in the interview conducted with Mr Engelbrecht. Mr Englebrecht's evidence was that he had refused to open the door of the train. The record of the interview shows that Mr Yeates then proceeded to ask him '*When he refused your instruction, what was his response?'* and '*So would it be fair to say that he ignored your instruction?'*. Mr Englebrecht had not said that he had given an instruction to the claimant. In the context of the alleged misconduct including 'disobeying instructions' this appears to have been a line of questioning designed to elicit a response in support of a finding that the claimant had disobeyed instructions. This in my view is clear evidence that the interview was not approached with an open mind.

38. Similarly the interview of the claimant fell short of what was reasonable. He was asked the same questions on more than occasion when he had already provided a clear answer. On more than one occasion it was asserted that he had denied having a conversation with Mr Engelbrecht, whereas the notes of the interview show that was not the case and the claimant was consistent that there had been a conversation and that he remembered what he had said but not Mr Engelbrecht's response.

39. It was further asserted by Mr Yeates to the claimant during the interview that the On-Train Data Recorder (OTDR) evidence showed the train was moving and that this conclusion had been confirmed by Mr Willard, the lead Competency Development Manager (CD). It is not clear to me that

either assertion was the case and it does not seem fair or reasonable that the assertion was put to the claimant as fact.

Boarding a moving train

40. Ms Waghorn's approach to the disciplinary procedure was there was a rule prohibiting boarding a moving train and to breach such a rule invariably would lead to a finding of gross misconduct and dismissal, without consideration of the severity of the breach.

41. It is my conclusion that the respondent had not formed a genuine and reasonable belief that the claimant had breached that rule. I considered the evidence as to whether the vehicle was moving was equivocal. Of particular significance is that the driver's contemporaneous account, given the day after the incident was that he did not think the vehicle had moved. Moreover the OBS's contemporaneous account referred to the train being *just about* to pull away from the platform and it was only in his subsequent interview conducted some 6 weeks later that he refers to train moving. Thirdly the OTDR did not reveal movement based upon the interpretation put upon it and was not conclusive on that point. Balanced against that were the platform staff's contemporaneous accounts that the train was moving and the OBS's later interview. In respect of the latter I conclude it this was somewhat tainted by Mr Yeates approach to interviewing as set out above.

42. At best a reasonable employer would have concluded that faced with conflicting evidence it was inclusive if train was in fact moving. Ms Waghorn was unwilling to do so, whereas Mr Bott acknowledged at the appeal hearing that it was not possible to conclude unequivocally that the train was in motion when the claimant boarded it.

43. In all the circumstances, my conclusion is that a reasonable employer would not have concluded from the evidence that the train was moving when the claimant had boarded it and would have given an employee with a lengthy, unblemished services history the benefit of the doubt.

Disobeying instructions

44. At best, looking at the evidence as a whole, it can be said there was a lack of clarity as to whether the claimant received an instruction not to board the train. I am satisfied that the OBS did not give an instruction not to board the train. I do not consider there was an implied instruction not to board the train by virtue of the fact Mr Engelbrecht refused to open the door. A refusal to open the door of the cabin could have been for any number of reasons and I do not consider it follows that the claimant should have understood from that refusal that he was being instructed not to board the train, whether by implication or otherwise.

45. Mr Bailey said in his interview that he '*tried to explain*' to Mr Chambers not to board the train. The CCTV from the incident was not provided but from the stills that were it can be seen that there was a considerable distance

between Mr Bailey and the claimant. It is a stretch to conclude that a conversation or interaction between Mr Bailey and the claimant took place from that distance. It was not suggested by either member of platform staff that Mr Bailey shouted an instruction at the claimant.

46. Bearing these things in mind, given the claimant's long unblemished service again I conclude that a reasonable employer would have given the claimant the benefit of the doubt.

Committing an Unsafe Act

47. The third aspect of wrongdoing, the more general allegation of the claimant committing an unsafe act needs to be looked at in the round. I conclude that a reasonable employer would have assessed the seriousness of incident and this should have formed part of their consideration. I conclude from both Ms Waghorn and Mr Bott's evidence to the tribunal that they were entirely closed to idea that a health and safety issue could have varying degrees of severity.

Delay

48. The incident for which the claimant was dismissed took place on 29 July 2020. The claimant was not interviewed until 14 September 2020, that is some 7 weeks later. The train driver was not interviewed until 6 November 2020. That was 3 months and 8 days after incident. The disciplinary meeting did not take place until 19 January 2021. I take note that the ACAS Code provides at paragraph 5 that the investigation should be carried out without unreasonable delay and I also note that the respondent's own disciplinary procedure at various places references the need for there not to be unnecessary delay. In particular at page 169 of the bundle the disciplinary procedure states that it is very important to carry out investigations of potential disciplinary matters without unnecessary delay to establish the facts of the case. There are other references to the need to avoid delay at pages 167 and 168 of the bundle.

49. I do acknowledge that up to a month of the delay from 5 November 2020 onwards may have been attributable to the claimant requesting no meetings take place over lockdown that was introduced at that stage. But that does not explain the considerable delays overall. I do not accept the Covid-19 pandemic was sufficient reason for these delays. I note that the interviews took place remotely. I note moreover the incident took place in the summer of 2020, not at the early part of the pandemic and by this stage procedures for dealing with disciplinary processes should have been in the place.

Sanction of dismissal

50. I conclude it was not within the reasonable range of responses for the respondent to give no consideration to the claimant's very long service to the respondent and his unblemished record in deciding the appropriateness of the sanction. Whilst I accept that there are occasions where the act of misconduct is so serious that such matters may not

mitigate against it, at the very least, in the particular circumstances of this case, the Ms Waghorn and Mr Bott should have addressed their minds to mitigation. The fact that they did not do so renders the decision to dismiss and the decision to uphold the dismissal outside the range of reasonable responses open to an employer in those circumstances.

51. Moreover the respondent was under an obligation to consider previous sanctions for similar incidents. This was provided for in the respondent's own disciplinary procedure. It is evident that whilst two similar incidents were identified (one resulting in a dismissal, the other not) there is nothing to suggest that there was at any stage an analysis or comparison between the disciplinary outcome in those cases and the claimant's case. I conclude that a reasonable employer would have given more consideration to what if anything rendered the incident of 29 July 2020 similar or different to the two previous incidents that had been identified.

Contributory fault

52. The claimant admitted that it was his conduct that led to his dismissal. As is clear from my findings the claimant contributed significantly to his dismissal through his own culpable conduct, adopting an unsafe practice which potentially placed his own safety and that of others at risk. Mr Toms' submission was that there should be 25% reduction. I do not believe that such a deduction adequately reflects the extent of the claimant's contributory fault. The significance of the safety critical nature of the claimant's work environment militates towards a greater deduction.

53. I assess the level of contributory fault at 75%. This deduction is to be made from the basic and any compensatory award.

Polkey

54. Mr Toms' submission was that this is not a case in which a **Polkey** deduction should occur if the finding of the tribunal was that the dismissal was substantively unfair rather than procedurally unfair. Although I have reached conclusions in relation to procedural deficiencies such as the delay and the manner in which the investigatory interviews were carried out, my conclusions do go to the substantive unfairness of the sanction and I do not consider that a fair dismissal would have occurred if a procedurally fair process had taken place. I therefore make no **Polkey** reduction.

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Employment Judge **Kumar**

Date 3 January 2023