



EMPLOYMENT TRIBUNALS

Claimant: Ms C Manning
Respondent: London North East Railway Limited

Heard at: Newcastle Employment Tribunal
On: 2 and 3 February 2023 and 16 and 17 November 2023
Before: Employment Judge Jeram

Representation:
Claimant: Ms H Hogben of Counsel
Respondent: Ms J Laxton of Counsel

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and wrongful dismissal are not well founded and are dismissed.

REASONS

1. By a claim presented on 12 October 2022, the claimant complains of unfair dismissal and breach of contract.
2. After some discussion, the issues to be determined in the unfair dismissal claim were identified as follows:
 - 2.1. Was the reason, or principal reason for the dismissal, that:
 - 2.1.1. The claimant had failed to follow the dispatch process in that she had not accepted hand signals clearly and she had not ensured a safe platform train interface;
 - 2.1.2. The claimant was involved in an altercation in that she argued with and assaulted a member of public.
 - 2.2. Does that factual reason amount to a potentially fair reason?

- 2.3. If the reason was misconduct, did R act reasonably in all the circumstances in treating that as a sufficient reason to dismiss C? Were there were reasonable grounds for that belief. The claimant accepts that R had reasonable grounds for believing that C had failed to follow the dispatch process. The claimant does not admit that R had reasonable grounds for becoming involved in an altercation in which she argued with and assaulted a member of public;
- 2.4. At the time the belief was held, had the respondent carried out a reasonable investigation. C contends that R failed to conduct a reasonable investigation in that the respondent:
 - 2.4.1. Failed to consider whether the decision to investigate was motivated by managers at the Newcastle depot;
 - 2.4.2. Failed to consider whether the investigation as unfairly influenced by managers at the depot;
 - 2.4.3. Failed to conduct a face to face interview with MD and TW and instead chose to rely on the incident report;
 - 2.4.4. Failed adequately or at all to consider C's rights under railway byelaws and at common law to use reasonable force;
- 2.5. Had the respondent otherwise acted in a procedurally fair manner? The claimant contends that the respondent breached paragraph 4 of the ACAS Code of Practice on disciplinary proceedings in that it:
 - 2.5.1. Failed to act consistently;
 - 2.5.2. Failed to carry out necessary investigations.
- 2.6. Was the dismissal was within the range of reasonable responses?
- 2.7. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
- 2.8. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 2.9. In relation to the wrongful dismissal, did the claimant do something so serious that the respondent was entitled to dismiss without notice?
3. The Tribunal received written and oral evidence from the claimant and on behalf of the respondent from Mr Suhayb Patel, Competence Development Manager and Laura Parker, Customer Experience Transition Manager.
4. The Tribunal had before it the hearing bundle comprising of 219 pages together with an on application by the claimant, two further documents produced by the claimant on day three and CCTV footage of the incident that was the subject matter of the disciplinary proceedings. Oral and written submissions were provided by both parties.

Findings of Fact

5. The claimant was employed from 11 November 1998 until dismissal on 10 June 2022, 21 years of which were in the role of Train Manager. The claimant was based at the Newcastle depot.
6. A Train Manager is an 'on train' and safety critical role. A principal accountability is operational performance and safety, being responsible for the safe operation of the train inclusive of door operations, dispatch and customer management. The job holder's personal safety responsibility includes ensuring that there is no harm to customers, colleagues, or the general public including taking reasonable care for the health and safety of themselves, their staff and other persons who may be affected by their own acts or omissions those of their staff. It also requires the jobholder to ensure that all accidents, incidences and near misses that occur at locations for which they are responsible are reported and thoroughly investigated and the remedial actions are taken and monitored to ensure that they are effective, in accordance with the relevant procedures.
7. The claimant was subject to the respondent's Rule Book which includes rules about general safety responsibilities. The first rule, applicable to all employees is that *"safety must always be your first concern. If there is no rule that allows or prevents you doing something you believe must be done, you must do it in the safest way you know taking into account your training experience"*.
8. A further principal accountability is to ensure delivery of excellent customer experience and service standards. The role of Train manager is a leadership role; post holders must create a safe working environment, ensuring all crew demonstrate the required safety knowledge and take remedial actions as required.
9. The respondent requires its employees to act professionally at all times. The respondent's Company Handbook requires employees to be helpful and courteous to its customers. The respondent recognises that the unfortunate reality that its public facing employees may sometimes encounter customers that are abusive and/or aggressive. It provides regular training to its employees to manage such situations using de-escalation techniques. On 15 October 2021, the claimant most recently attended conflict avoidance refresher training, delivered via Teams.

The Safe Dispatch of a Train

10. The period of time when the train departs from full station as a potentially dangerous one. Potential risks include a train departing when a person is on the platform is close to it or holding onto it, risking the person being dragged by the train and pulled under it, or an object on the platform as close to it, which risks the object being dragged under the train and-in the worst case-potentially causing a derailment. A train manager is responsible for the safe departure – or 'dispatch' - of the train from the station platform.
11. To ensure the safe departure of a train, the dispatch process is governed by the respondent's own general dispatch instructions, the Rail Safety and Standard Boards (RSSB) rulebook on station duties and train dispatch and the RSSBs rulebook module on general safety responsibilities and personal track safety for non-track workers. Furthermore, the respondent manages the risk at dispatch by carrying out risk assessments for specific platforms used by trains, including

platform 1 of Middlesbrough station. Train Managers are subject to a two-year cycle of observation and assessment. On 12 February 2022, the claimant was observed carrying out a dispatch of the train from stations along the route between Newcastle and York. She was assessed as competent.

12. Where dispatch of a train is carried out with two persons, two stages of check are required:
 - 12.1. First. the station dispatcher and the Train Manager take up designated matrix positions on the platform, with the station dispatcher positioned with a full view of the train and one another. They independently carry out first check of the train and the platform. This involves checking the signal at the end of the platform indicates it safe to depart, ensuring that no individuals are close the train and that no objects on the platform close to the train. If the station dispatcher is satisfied with their checks, they indicate this to the Train Manager by holding up a baton with the white light ('station duties complete' signal). If the Train Manager is satisfied of their checks, they accept the "*station duties complete*" signal by fully raising one arm in the air. The Train Manager then steps onto the train and closes all carriage doors (with the exception of the door the Train Manager is using);
 - 12.2. The second stage requires the Train Manager to step back on the platform to ensure sight of the full length of the train. A second check of the train and platform is then carried out, independently, by both the station dispatcher and the Train Manager. This again involves carrying out the same checks as before, as well as a further check to ensure that the external lights above the carriage doors are extinguished, indicating that the doors are closed and locked (with the exception of the door the Train Manager is using). The second check requires that nobody is trapped in the doors, for example by clothing, nobody is in contact with the train, and that it is safe to start the train. If the station dispatcher is satisfied, they indicate that the Train Manager by once again holding up a baton with a white light (this time known as the 'train safety check complete' signal). If the Train Manager is satisfied, they accept the "*train safety check complete*" signal by fully raising one arm;
 - 12.3. The Train Manager then steps into the train, closing the remaining carriage door, and communicates to the Driver that it is safe to depart (known as the "*ready to start*" signal).

Incident on 14 March 2022

13. On 14 March 2022, the claimant was the Train Manager aboard the respondent's train 1Y80 ('the train') travelling from Newcastle to London King's Cross. At 07:08 the train stopped at platform 1 of Middlesbrough station. The claimant was responsible for the safe dispatch of the train from Middlesbrough station to its onward destination. The Trans-Pennine Express ('TPE') train to Manchester, due to follow at 0721, was cancelled. The claimant made an announcement on the 1Y80 train, reminding passengers that tickets for the TPE train following were not valid for travel on the train. There were a number of customers wishing to join train 1Y80 as far as York, some of whom had tickets that were valid for travel on 1Y80 and some who did not. It was possible to purchase a ticket on the train, for example to travel to York before changing trains bound for Manchester.
14. MD was a dispatcher at platform 1 of Middlesbrough station on that day. He was an employee of TPE. Having witnessed an incident that took place as a train was

about to depart Middlesbrough station between the claimant and a passenger, MD contacted the respondent shortly after the incident, out of concern for the claimant.

15. Welfare calls were made by the respondent to the claimant who was still on board the train. The claimant completed a report form on the same day. In that report, she stated that she had made an announcement that TPE tickets for the 07:20 train travelling to Manchester airport were not valid on the train and described a passenger on the train as disbelieving that the train was travelling to Manchester airport, calling her a liar. She stated that she asked to see his ticket, that she knew he did not have a ticket *'so I said he wasn't travelling with me'*. She described the passenger as *'very aggressive'* having an *'abusive tone'*. She described taking the first tip of dispatch i.e. *'station duties complete'* to close all of the doors other than hers, and the passenger attempting to jump into her local door which she refused, telling him to stand back. She said he called her racist; she described him grabbing the door to prevent it from closing and her asking to let go of the door. She said he pushed the door open and lunged and grabbed her *'I pushed the man away with fear that he was going to come back at me punch or knife me'* she said the platform staff held the passenger back saying they would get the police and *'as my door closed I finished my dispatch duties'* and that as a train was leaving the man threatened her and called her a racist bitch.
16. On the same day, ML, who works at the Middlesbrough Booking Office, provided an email report to the respondent. She stated she had heard a man shouting asking if the train went to Manchester, but that he ignored her reply that it was bound for King's Cross. She is that the claimant asked for his ticket, he was *'nasty'*. She said he asked to buy a ticket but the claimant asked him to leave the train so she could dispatch he refused, step down, that the door started to close and he stopped the doors and trapped the claimant she pushed him away, he put his arm between the door that *'we tried to pull his arm away from the door but it was really strong'*, he called the claimant a racist and a witch. When she was interviewed by telephone on 13 May 2022, ML expanded on her description of the man being *'nasty'* as the passenger shouting, being *'abrupt and aggressive, not like a normal passenger'*. She said he was rude, not swearing just rude and argumentative, quite defiant. She said the passenger grabbed the claimant by her blazer looked rough as if he wanted to drag her off the train. She said she thought he called the claimant a racist and evil witch because she allowed [TW] to board, who was white, and that his bad behaviour *'escalated after that'*. She was unsure but thought that the passenger pushed the claimant two or three times that the claimant pushed him two or three times.
17. On 16 March 2022, MD provided a written report of the incident on 14 March 2022. He said he noticed that the coach letters and destination were not showing on customer information panels on the side of the train, which tends to lead to uncertainty and gives rise to a significant number of questions from passengers. He stated that the dispatch procedure started 15 seconds late, and that the first dispatch check took place. He stated that the claimant was engaging with two people, who were not on the dispatch corridor. He gave a second tip; the claimant allowed TW, a Northern Rail staff member onto the train via her local door. He saw the second male approach the door, causing him to move towards the train as it had technically been dispatched when he could hear the male shouting that he would *'buy a ticket on the train, you let him on'*. MD stated that he saw the

claimant 'shove' the passenger away from the train saying 'you're not getting on because of your attitude' and that the male retorted 'you're nothing more than a racist', a reference to the fact that the passenger was black and that the claimant had allowed TW, a white male, to board. He described the situation as 'heated' and that the claimant 'shoved the male again' with a repetition of the verbal exchange. He said he stepped between the claimant and the passenger to move the passenger away from the train and that whilst local door closed the passenger placed his arm in the door to prevent it closing. He repeated his instruction to the passenger to move away or that he would call the British Transport police, upon which the passenger became compliant. The local door then closed the train departed. He said he ensured safety of the passenger train interface by holding the passenger back with his dispatch baton, 'ready to take further action if required'. He said he explained to the passenger that the guard had the right to refuse travel. He said that the passenger was informing the duty station managers that he had been racially abused, that he had offered to buy a ticket on the train but that the manager would not allow him to board, noting that the passenger had omitted to say that the claimant had taken issue with his attitude. MD said he provided the passenger with a complaints form, upon which the passenger became calmer and more compliant, 'almost apologetic for shouting at us'.

18. On 23 March 2022, CCTV footage was obtained and reviewed by local management, after which a decision made to open an investigation. The CCTV footage consists of visual footage only, with no accompanying audio recording. On 24 March 2022, investigator Paul Middlebrook ('PM'), On Train Skills and Competence Manager based in Yorkshire, having reviewed the CCTV footage, made the decision to stand the claimant down from safety critical duties.
19. On 27 March 2022, trainee Northern conductor TW provided a written account of the incident on 14 March 2022. He stated he witnessed an assault on the claimant. He said he was boarding the London train at Middlesbrough and that the claimant was talking to a man who was frustrated that he couldn't travel on the train, in his opinion, probably because the TPE service was cancelled. He said as he boarded the train he accused the claimant of being racist and grabbed her as she stood in the doorway of the train. He said there was a lot of shouting and some staff from the platform stepped in to assist. He said he witnessed the man push the claimant and shouted at her and that it was over very quickly.

Investigation Meeting

20. On 7 April 2022, upon the claimant's return from annual leave, the claimant was interviewed; she was accompanied by her trade union representative.
21. In her interview, the claimant said she had worked for 21 years as a guard and confirmed she was experienced in her role. When asked whether there were any personal issues outside of work that could be affecting her concentration, the claimant this said she had suffered the recent loss of a family member. She described how to carry out a train dispatch. Of the incident, she said she asked the passenger to alight the service because she was conscious of time and she wanted him on the platform so she could direct him to the TPE staff because he was going to Manchester.

22. She said she allowed the dispatch process to continue when the passenger was near the train and still trying to board because she was conscious about delaying the train. She described the passenger as *'very aggressive'* and *'intimidating'*, accusing her of lying, and that she did not want him on the train all the way to York.
23. Of the physical interaction, the claimant said she told him he wasn't to join the train, that she held both her hands up to indicate as much.
24. After viewing the CCTV, the claimant was asked why the dispatch procedure did not accord with the process she had just explained to PM. In response, the claimant decided to make a statement: *'at the time of the incident I genuinely believed, and to some extent still do, the dispatch procedures I carried out was sufficient. However, on reflection I now realise I should have fully stopped the dispatch procedure and got assistance'*.
25. When asked what caused her to push the passenger eight times, before the passenger pushed her back, the claimant said it was because of the way he spoke to her *'he called me a racist bitch and I feared him. I didn't want him joining the train'*. She did not challenge the assertion that the claimant pushed the passenger several times before he retaliated with a single push. She confirmed with hindsight she could have considered halting the dispatch process and asking for British Transport Police to attend.
26. PM decided to suspend the claimant from duty. Attempts to locate the passenger were unsuccessful.
27. PM compiled an investigation report. He concluded that the claimant had not carried out the dispatch process correctly by failing to acknowledge the *'station duties complete'* hand signal, that the claimant acknowledged that she had not carried out the process correctly, and that on reflection she accepted that she should have stopped the dispatch process. He concluded that the claimant had allowed the process to continue with the passenger standing in the platform train interface, touching the train.
28. PM concluded that the passenger did not believe that the service was the London service, which led to a disagreement and that he wanted to purchase a ticket on board which the claimant refused, stating he had an aggressive attitude and therefore would not allow him to travel. He concluded, having seen the CCTV footage, that the claimant was holding her arm out advising the passenger stay back, then pushed the passenger away in the first of a series of pushes as the passenger continue to return to the door, attempting to board. He noted that the claimant *'shoved'* the passenger eight times before the passenger retaliated with a single push back, at the very end of their interaction.
29. He noted that the claimant had received most recently, conflict avoidance training on 5 October 2021, in which she received discussion about showing empathy, using discretion and knowing when to walk away and call for support.
30. This investigation pack contained stills of the CCTV footage with accompanying comments provided by PM as well as witness evidence, relevant extracts the hand

book, risk assessments, and rulebooks. PM commented that the claimant had identified factors within a personal life that were impacting her work.

31. On 20 May 2022, the claimant was sent an invitation to attend a disciplinary hearing to consider the allegation that she had argued with and assaulted a member of the public and that these constituted a breach of the standards of behaviour requiring her to act with honesty and integrity and not bring the company into disrepute. This was identified as capable of amounting to an act of gross misconduct. It was also alleged that the claimant had failed to complete the dispatch process safely and that this was a breach of the company handbook requiring her to comply with the legislation industry standards and to ensure general safety responsibilities whilst holding a safety critical role. This, too, was described as a potential act of gross misconduct.
32. The letter informed the claimant that the potential outcome of the procedure was summary dismissal. She was reminded of her right to be accompanied by an employee or a trade union representative. She was reminded of her ability to call witnesses if they were able to contribute to the clarification of facts.

Disciplinary Hearing

33. The disciplinary hearing took place on 2 June 2022, when the claimant was represented by her trade union representative. The hearing was chaired by Suhayb Patel ('SP'), Competence Development Manager, based at London King's Cross. In this role, SP was responsible for training developing coaching managers to maintain safety critical compliance, verifying assessors for other employees to meet safety critical compliance standards, and personally assessing the performance of safety critical managers. SP and the claimant did not know one another; in evidence the claimant confirmed that it was no part of her case that SP played a part in the 'vendetta' she perceived she was the subject of by local management.
34. The claimant confirmed that she had received the disciplinary invitation letter, together with supporting documents. The claimant's trade union representative stated the investigation was '*very biased*', on account of the comments made by PM in his report including his commentary accompanying the still images in his investigation report. He contended that PM had fabricated passages in his report attributed to the claimant's insights about her personal circumstances. He argued that there was a vendetta in the Newcastle depot because management did not like the claimant and that '*this bias influenced the investigating manager*'. He argued that upon seeing the claimant's hand raised, this was a classic sign to back off and that it was the passenger '*who chose to make it physical*', that the passenger exhibited behaviour variously described as weird, peculiar and unacceptable. He accepted that the claimant had shoved the passenger, but maintained that it was a passenger who assaulted the claimant. He noted that customers were quick to complain, so that the absence of a complaint from this passenger was significant. The claimant stated that she could not recall the last time she received conflict training or whether she had signed the attendance at the training on 6 October 2021, albeit she could recall she had connectivity issues during the training. The claimant's representative pointed out that there had been incidents on the train a few months ago involving knives when the police were

called and pointed out that the claimant was alone with female members of staff. He complained there had been minimal welfare concern for the claimant.

35. The claimant denied she was arguing with the passenger; she confirmed MD instigated a call to British Transport Police. The claimant said that it was not until she viewed the CCTV that she realised she had failed to dispatch the train correctly, that this came as a surprise to her and that she would like help to deal with things differently. She stated that she would, with hindsight, have stopped the dispatch process.
36. The claimant said she felt the respondent had failed in its duty of care towards her, that she was assaulted but two material witnesses had not been interviewed. The claimant contended that this was a reference to a complaint that MD had not been interviewed.
37. SP summarised the claimant's points, including her contention that whilst the door appeared to close on the passenger's arm, that was not the case and that she was in fact trying to stop the door closing on him.

Disciplinary Outcome

38. SP delivered his decision at a meeting on 10 June 2022; the claimant was again accompanied by her trade union representative. He summarised the claimant's numerous representations, before addressing each point. His decision, supported by his findings, was subsequently sent to the claimant in writing.
39. SP stated that his decision was based on his own viewing of the CCTV footage. He concluded that she had failed to carry out a safe dispatch of the train, and furthermore, that she had admitted this. In particular, he found that she had not accepted the 'station duties complete' signal from MD at all, and proceeded straight to closing the carriage doors (with the exception of the local door she was using). He found that the train safety check complete signal was also non-compliant – instead of accepting the signal by fully raising one arm whilst standing on the platform, she partially raised her arm, and wriggled her fingers whilst standing on the train step. SP further concluded that she had failed to ensure that there was a clear platform train interface before giving the driver the 'ready to start' signal; the passenger was standing close to the train, demonstrating behaviour which suggested a risk of him approaching even closer to it.
40. SP did not accept that the claimant's contention that MD's involvement in an unsafe dispatch assisted her case. He noted the claimant's desire to ensure the timely dispatch of the train to avoid impacting performance but noted that safety is of paramount importance.
41. SP rejected the claimant's contention that she used reasonable force to defend herself. He considered that pushing a member of the public six times was not consistent with someone acting in self-defence. He noted that the claimant had put her arm out with the palm facing outwards to indicate stop, and that this was consistent with the training provided at the Conflict Avoidance Training. He noted that the claimant did not raise any connectivity issues during or after the training session. He concluded that two warnings given by herself would be reasonable and that that if this was not accepted by the individual concerned, he would expect

the claimant to walk away and call for additional support, such as the British Transport Police, something that the claimant did, on her own account, in July 2021.

42. He stated he was concerned that the claimant had stated that no one would be any the wiser of the incident given that she had not herself reported the incident but that rather staff at Trans-Pennine Express had reported the incident. He rejected her contention that a lack of complaint or a formal prosecution was indicative of the correctness of her actions.
43. He rejected the claimant's contention that she had been unfairly treated by local management, noting that the respondent has a duty to investigate such incidences. Of her claim that she was being harassed by management, he concluded that she was aware of how to raise such concerns about others. He rejected her claim that the respondent had failed in its duty to support her mental health well-being, noting that the respondent had provided her with CBT sessions.
44. SP concluded that the claimant's actions had caused the train to depart to non-compliant and unsafe manner, with the potential to cause injury and harm and that furthermore her behaviour towards a member of public fell far below the response required standards of professionalism and potentially brought the company into disrepute. SP concluded that the allegations were made out and that they constituted gross misconduct.
45. SP considered mitigating factors including length of service and her clean disciplinary record. He concluded that a lesser sanction was inappropriate because the claimant's actions brought about a significant safety risk. He considered whether to move the claimant to a non-safety critical role but concluded that to be inappropriate because of her actions during the altercation with the passenger. He decided that additional training on the dispatch process and conflict avoidance not appropriate given his conclusion that the claimant had been aware of the appropriate dispatch process and the respondent's expectations about behaviour, but that she had simply failed to comply with them.
46. He concluded that summary dismissal was the appropriate sanction. The claimant was reminded of her right to appeal.

Appeal Hearing

47. The appeal hearing took place on 14 July 2022. The claimant attended the meeting, accompanied by a different trade union representative. The hearing was chaired by Laura Parker ('LP'), Customer Experience Transition Manager. The claimant and LP met once, approximately 5 years previously, but were otherwise unknown to one another. LP did not work with SP.
48. At the appeal hearing, the claimant contended that the decision was based on a misinterpretation of the facts and that the sanction was excessive. She challenged what it was about the findings that questioned her honesty and integrity or brought the company into disrepute. She challenged the soundness of the decision that she was involved in an altercation, given the lack of audio accompanying the CCTV footage. She accepted that she did not follow the dispatch process *'to the letter'* and that whilst she *'admitted she made a mistake, she did not admit that she did*

something wrong'. It was said that the respondent's treatment of two other train managers, AG and JG, who had been involved in *'similar incidents'* set a precedent, since AG had been given a warning before being dismissed.

49. It was said that the absence of a complaint from the passenger was significant, and that the claimant said she felt victimized by some of the managers in the depot and that they had committed management errors for which they had not been disciplined. It was said that there was a lack of evidence from the driver who was described as a *'key'* witness. It was suggested that there was no realistic alternative option for the claimant, and that leaving the train standing was not one of them. LP was invited to consider what the respondent had done for the claimant, as an organisation. The claimant contended that the passenger had breached regulation 11 of a set of railway byelaws which prohibits *'any person'* from interfering with any automatic closing door.
50. LP acknowledged that the claimant suggested bias in the interpretation of the CCTV footage by PM, but reminded the claimant that she did not know her. She invited the claimant to comment on her claim that she used reasonable force. The claimant said she had not used reasonable force, but that she was defending herself and that train managers do not understand what reasonable force means. She replied *'I was trying to protect me. I think it's sufficient to verbally tell someone, then if they don't listen, you have no choice but to defend yourself'*. The claimant again added that if MD had not reported the incident, she would not have done so herself because she said, she would not have received support.
51. The claimant said she did not believe her length of service had been taken into account, that there appeared to be no room for mistakes to be made in an operational role and she provided a letter from her GP which stated that the claimant had suffered a variety of physical ailments in the past year.

Appeal Outcome

52. An appeal outcome meeting took place on 19 July 2022, when the claimant attended via her trade union representative. The decision, including LP's findings, was subsequently sent to the claimant in writing.
53. LP concluded that the driver was not a key witness; they are not actively involved in dispatch process, save in circumstances that did not apply on 14 March 2022 and, in any event, the CCTV footage the driver would be able to view would be identical to that already obtained. She stated that she did not take into account the case of AG and JG, because each case turned on its own facts. She rejected the claimant's contention that it was not made clear to her what an acceptable dispatch process consisted of, observing that the claimant had described the correct dispatch process to PM. The claimant's concerns about poor management did not have any bearing on the disciplinary charges. LP emphasised that she was independent and based her decision only on the evidence provided to her. Contrary to the claimant's contention, her length of service was considered by SP, who she considered had carried out a fair and transparent procedure. The claimant's claim that she was helpful to customers by driving them in her own car was inappropriate and highlighted a lack of judgment regarding safety of herself and others. She had sympathy with the claimant's medical evidence, but noted the claimant had not advised that she had been unfit to attend work. She found that

the claimant erroneously prioritise performance (a timely departure) over safety. LP stated the claimant's statement that she would not have reported the incident herself was in itself a breach of her duty to report accidents incidents and near misses locations for which she was responsible and was a failure to demonstrate the high standards of honesty and integrity required of her. She found the claimant's actions on 14 March 2022 unacceptable and found the decision that the charges of dispatch regularly and assault were reasonable and appropriate. She rejected the claimant's contention that the '*customer was believed over herself*' noting that CCTV evidence clearly shows the dispatch process was not followed and that the claimant pushing the customer six times did not constitute reasonable force or self-defence. She concluded the actions amounted to gross misconduct and SP's decision to terminate her contract of employment was upheld. In her oral evidence, LP confirmed that she had concluded that the passenger was attempting to re-board the train, and that the claimant's response to his attempts to re-board the train was to push him six times before the passenger pushed the claimant once.

Unfair Dismissal – The Law

54. An employee has the right under section 94 of the Employment Rights Act 1996 (ERA) not to be unfairly dismissed.
55. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
56. The reference to the '*reason*' or '*principal reason*' in section 98(1)(a) is not a reference to the category of reasons in section 98(2), but a reference to the actual reason for dismissal. It '*is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*': Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. In Abernethy the Court of Appeal noted that: '*If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason*'.
57. In this case, the respondent contends that the reason for the claimant's dismissal was a reason relating to the conduct of the claimant, which is a potentially fair reason for dismissal within section 98(2)(b). The categorisation of that reason (i.e. within which of subsection 98(2)(a)-(d) it falls) is a matter of legal analysis: Wilson v Post Office [2000] IRLR 834, CA.
58. An employer may have multiple reasons for dismissing an employee in which case the task of the Tribunal is to have regard to the totality of the reasons when assessing fairness: Robinson v Combat Stress.
59. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996.
60. The Tribunal must take as the starting point the words of s98(4). Section 98(4) poses a single question namely whether the employer acted reasonably or

unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. The burden is neutral.

61. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).
62. The approach to be taken when considering s98(4) in cases of alleged misconduct is set out in the decision of British Home Stores v Burchell [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions: (i) Did the employer carry out a reasonable investigation? (ii) Did the employer believe that the employee was guilty of the conduct complained of? (iii) Did the employer have reasonable grounds for that belief?
63. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies just as much to the procedure by which the decision to dismiss is reached as it does to the decision itself: Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.
64. In respect of consistency of treatment, Hadjiioannou v Coral Casinos Ltd (1981) IRLR 352, identified 3 situations in which a consistency argument may be relevant: where employees have been led to believe certain conduct will not lead to dismissal; where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal was not the real reason; where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable to dismiss.
65. To be capable of being fair, section 98(2) ERA only requires that the reason relates to the employee's conduct, it does not have to amount to gross misconduct. In any event, a finding of gross misconduct will not automatically render a dismissal fair, see Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854 EAT.
66. The characterisation of an act as '*gross misconduct*' is thus not simply a matter of choice for the employer; it cannot be the arbiter of its own conduct in dismissing the employee. Without falling into the substitution mind-set warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, the tribunal must assess whether the conduct in question was such as to be capable of amounting to gross misconduct: Eastland Homes Partnership Ltd v Cunningham UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37.
67. The tribunal must take into account relevant provisions of the In ACAS Code of Practice on Disciplinary and Grievance Procedures when assessing the reasonableness of a dismissal on the grounds of conduct.
68. Where a claim of unfair dismissal is well founded, the claimant may be awarded compensation under section 112(4) of the Employment Rights Act 1996,

comprising of a basic award and a compensatory award in accordance with ss.119-126 of the Act.

69. Section 123(1) ERA provides that, subject to certain other provisions, the compensatory award shall be such amount as is just and equitable having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
70. In determining what is just and equitable for these purposes, the tribunal is entitled to reduce the compensation by a percentage, representing the chance that the employee would still have lost their employment had the dismissal been fairly carried out: Polkey v AE Dayton Services Ltd [1987] ICR 142.
71. Additionally, both the basic and compensatory awards in an unfair dismissal case can be reduced to reflect the employee's contributory conduct, see sections 122(2) and 123(6) ERA. At that stage, the focus is not on the employer's conduct but on that of the employee.
72. Determining whether a Claimant's conduct should lead to a reduction in compensation for these purposes, it is first necessary for the tribunal to find that the claimant was in some way culpable or blameworthy: Nelson v BBC (No. 2) [1980] ICR 110 CA. What might constitute blameworthy conduct for these purposes may include conduct that is unreasonable in all the circumstances, however not all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved: per Brandon LJ at p121.

Discussion and Conclusions

Reason for Dismissal

73. I find that the belief held by SP that caused him to dismiss the claimant was that it was more likely than not that that on 14 March 2022, the claimant had failed to carry out a compliant dispatch of the train at platform 1 on Middlesbrough station and that she was involved in an altercation in which she argued with and assaulted a member of the public.
74. That was a reason related to the claimant's conduct. That is a reason within section 98(2) ERA 1996 and, as such, was a potentially fair reason for dismissal.

Reasonableness

75. The claimant accepted at the disciplinary hearing conducted by SP that she had failed to carry out the dispatch procedure correctly, and furthermore accepted that that failing was captured on the CCTV footage made available to her. SP, who was able to view the footage and apply his own knowledge of the procedure, did have reasonable grounds, therefore, that the claimant had failed to carry out a compliant dispatch of the train. No further investigation into this limb of the disciplinary charges was reasonably necessary.
76. SP had reasonable grounds to believe that the claimant was involved in an altercation in which she argued with and assaulted a member of the public. The claimant did not dispute that the CCTV footage accurately captured her behaviour.

Even without audio, those actions were plainly capable of being construed as an altercation. For the avoidance of doubt, and having viewed the CCTV footage and its quality, I consider that the difference between the opinion of PM on the one hand and SP and LP on the other about the number of times the claimant pushed is not significant; the claimant does not suggest so, either. SP was entitled to arrive at the conclusion that the physical contact amounted to assault. The claimant made physical contact with the passenger first, and repeatedly. SP was entitled to conclude that that conduct was unacceptable by the respondent's standards; it formed no part of the claimant's case that it did. Indeed, the claimant accepted that, with the benefit of hindsight, she should have, as SP found she had been trained to, walked away from the situation and seek assistance.

77. Insofar as the claimant sought to argue that she had a general right to defend herself, it was a reasonable response on the part of SP to reject that argument on the basis that the claimant pushed the passenger six times and that that was inconsistent with acting in self-defence; the claimant gave no explanation at all why she anticipated a physical attack on her, so as to justify her acting in self-defence by pushing him six times.
78. Furthermore, it was reasonably open to LP to interpret the witness evidence, in particular that of MD, and the passenger's body language captured on the CCTV footage as the claimant pushing the passenger not in self-defence, but in an effort to prevent him re-boarding a train she had already ejected him from. That interpretation is consistent with the claimant's statement at the appeal hearing that she considered it appropriate to push him because he was not listening to her.
79. I considered whether the procedure adopted was reasonably fair. The claimant was asked to complete a report on the same day as the incident; she was asked to account for the incident promptly.
80. I considered the respondent's characterisation of the allegations in its invitation letter. It stated that that her alleged behaviour towards the passenger potentially amounted to a breach of the requirement to act with honesty and integrity as well as the duty to not bring the company into disrepute. I concluded that those characterisations were, respectively, inapplicable and unevidenced. Although I was broadly satisfied that the allegation of failing to comply with the dispatch process was likely to amount to a breach of an industry standard and of the respondent's handbook, I noted that neither were explicitly referred to in the meetings or the outcome letters. I considered whether those mischaracterisations and omissions had an impact on the fairness of the disciplinary proceedings. I concluded that they did not. The factual allegations were abundantly clear to the claimant, she did not suggest otherwise, and the claimant sought to defend herself against them. SP found, as he was entitled on the evidence to find, that the claimant knew in relation to each allegation what was required of her because of her training and experience, but that she failed to comply. The respondent did not seek to advance the labelling of the actions and they formed no part of SP's findings, or LP's findings.
81. The investigation was reasonable. The claimant did not ask for any additional investigations to be carried out. I did not accept that it was outside the band of reasonable responses to fail to conduct a face-to-face interview with MD or TW,

as the claimant contends. MD and TW each witnessed only part of the incident; neither account was significantly at variance with one another, or the claimant's own account, or the CCTV footage. In short, there was nothing before the respondent that put it on notice that a face-to-face interview was necessary. Nor am I satisfied, as the claimant sought to suggest, that she identified the alleged failing at the disciplinary hearing; assuming an element of consistency on the part of the claimant, one of the *'two people who were not interviewed'* is likely to have been the driver, who she described to LP as *'key'*. Furthermore, the claimant made no mention in her written evidence of her alleged request to SP for the respondent to conduct a face-to-face interview MD and TW, and nor did she identify the evidential value of doing so, save for the suggestion that MD may have been able to expand on what he meant by the word *'heated'*. Finally, it was open to the claimant to take witness evidence of MD or TW herself; she was explicitly notified of a right to provide witness evidence in advance of the disciplinary hearing. A face-to-face interview may be the ideal, but that is not the test. I am satisfied that relying upon written evidence provided by MD and TW in the circumstances above was reasonable.

82. The claimant referred to *'the railway byelaws'* in the appeal hearing as a basis for arguing that the passenger had failed to comply with an obligation not to obstruct or interfere with the door. I am not satisfied that the claimant referred to them at the appeal hearing as the source of her right to use physical force to defend herself: that is not what the notes of the appeal hearing suggest, and nor does the claimant, in her written evidence. In any event, whether the alleged source of the right was a byelaw, or common law, both SP and LP considered whether the claimant's actions were carried out in self-defence and both decided, for slightly different reasons, rejected her claim.
83. The claimant's contention that the respondent failed to consider whether the decision to investigate was motivated by management or whether the investigation was unfairly influenced by the managers at the depot is incorrect. Both SP and LP heard the claimant's concerns about her treatment by local management, but decided that it did not have a bearing on their decisions, since they were based on the facts before them. At the heart of this complaint is a simple refusal on the part of the claimant to accept that MD's report of the incident of 14 March 2022 demanded further scrutiny.
84. Finally, and insofar as the claimant suggested by her trade union representative that there were other employees involved in *'similar incidences'*, I received no evidence from either party about the particular details of those instances, nor any details about a third employee, HA, referred to in the claimant's written evidence. I am not satisfied that those employees were, or were likely to be, in circumstances that could be described as *'truly parallel'*.
85. The claimant exercised her right of appeal. SP and LP were independent of one another, of the claimant as well as being independent of local management. Both gave detailed and thorough responses to the numerous issues the claimant raised during their hearings.
86. I am satisfied that the respondent conducted the disciplinary procedure in accordance with the ACAS Code of Practice on disciplinary procedures.

87. Turning to the respondent's characterisation of the findings as acts of gross misconduct. The claimant held a role in which safety is the paramount consideration. Viewed objectively, a breach of the dispatch process was capable of amounting to gross misconduct. I am further satisfied that the respondent acted reasonably in characterising the breach of the process as gross misconduct. The claimant failed to acknowledge at all the '*station duties complete*' signal from MD, and proceeded to close the carriage doors; whilst standing at the local door; she improperly acknowledged the '*train safety check complete*' signal and proceeded to give the driver the '*ready to start*' signal whilst the passenger was on the train platform interface i.e. close to the door, having already made several attempts to board the train. The claimant was an experienced train manager who knew how to carry out a safe dispatch and she was responsible on that day for the safety of the train, passengers and members of the public. She failed to carry out a safe dispatch; the potential consequences of which very serious.
88. Similarly, I am satisfied that a finding of assault was objectively capable of amounting to gross misconduct and that the respondent acted reasonably in characterising it so. The claimant initiated physical contact, and then repeatedly pushed a member of public in circumstances that her training had informed her to walk away and seek assistance. Her duties required her to provide excellent customer service, as well as demonstrate leadership qualities to her staff.
89. SP considered whether dismissal was an appropriate sanction. He took into account mitigating factors and alternatives to dismissal including providing additional training or a move to a non-safety critical role, but discounted those possibilities given his finding that the claimant knew what her duties required of her, but she simply failed to comply with them.
90. The claim of unfair dismissal is not well founded.
91. For the avoidance of doubt, arguments about the relevance or otherwise of subsequent criminal proceedings against the passenger are not addressed in these findings, the claimant accepting in her closing submissions that they could have no relevance to the respondent's prior decision.

Wrongful Dismissal

92. In a claim of wrongful dismissal, it is for an employer to establish that the employee was guilty of conduct that fundamentally breached his or her contract of employment, entitling it to dismiss them summarily. The employer is entitled to dismiss where the employee has committed an act of gross misconduct. In *Neary v Dean of Westminster* IRLR [1999] 288 (para 22), Lord Jauncey of Tulichettle rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing. The tribunal is required to make its own findings of fact: *Boardman v Nugent Care Society* [2013] ICR 927.
93. The nature of the respondent's business, as well as the claimant's role, is a safety critical one. The claimant had a significant amount of experience, and demonstrated competence in the safe dispatch of a train in her assessment only one month prior to the incident. She was required to undertake conflict avoidance training every two years and had attended a refresher course only 5 months prior to the incident.

94. On 14 March 2022 the claimant failed to correctly carry out the *station duties complete* check, she failed to carry out her 'train safety check complete' check and she gave the driver a 'ready to depart' signal when it was unsafe to do so.
95. In relation to the 'station duties complete' check, the claimant was not at the matrix position when MD gave his signal; she was not in a position therefore to satisfy herself of the necessary checks from the train step before accepting the signal. She did not in fact accept at all the '*station duties complete*' signal from MD before closing all other carriage doors. Whilst positioned on the train step, and during the dispatch process, the claimant allowed TW to enter the train platform interface in order to board the train. She should not have done so and continued with the dispatch procedure.
96. I am not satisfied that she reasonably perceived that she was in physical danger from the passenger: she relied in oral evidence from her statement contained in her report on 14 March 2022 that she believed the passenger would punch her or knife her and her description of his aggressive behaviour, throughout the disciplinary proceedings and in evidence, generalised as it was, was consistent with the evidence of MD, TW and ML that the passenger was shouting and verbally aggressive and insistent on re-boarding the train. The passenger had complied with her earlier instruction to alight the train, but remained insistent that he re-board the train; he also remained at the platform train interface, close to the train. It was unsurprising that her decision to allow TW to board caused the passenger's conduct to escalate.
97. The claimant did not alight the train in order to carry out her train safety check, as she was required to do. She closed the local door whilst the passenger's arm was holding on to the internal handrail. I agree with LP's finding that the physical actions of the passenger were consistent with him attempting to re-board the train. The claimant responded by pushing him away six times. As she informed LP, she felt entitled to do so because he would not listen to her instruction. She pushed the passenger with significant force, on one occasion causing him to spin to the side and his scarf billow into the air. Whilst I recognise the pressured circumstances in which the claimant found herself, ML and TW were in her immediate vicinity to call upon for assistance as well as MD who was, necessarily, in her direct line of sight.
98. The claimant gave the '*ready to start*' signal to the driver when the passenger and MD were standing close to the train. On her own account the passenger was displaying agitated and unpredictable behaviour, restrained only by MD's baton. The decision to signal to the driver that the train was ready to depart risked injury, or worse, to the passenger and MD.
99. The claimant's actions above were contrary to her duties, as well as her experience and training. Safety was paramount; the only acceptable response to the situation the claimant faced was to halt the dispatch and seek assistance and the claimant knew this.
100. I am satisfied that the claimant's actions amounted to gross misconduct, entitling the respondent to summarily dismiss. The wrongful dismissal claim is not well founded.

Employment Judge Jeram

Date: 14 February 2024

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