



EMPLOYMENT TRIBUNALS

Claimant: Mr O Soile

Respondent: South Eastern Railway Ltd

Heard at: London South (Croydon)

On: 3 December 2018

Before: Employment Judge Tsamados

Representation

Claimant: Mr Yemi Adio

Respondent: Mr Daniel Isenberg of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

- 1) The claimant was not unfairly dismissed.
- 2) The complaints in respect of outstanding holiday pay and notice pay are dismissed on withdrawal.
- 3) The claim is dismissed.

REASONS

Claim/complaint(s)

1. By a claim form presented to the employment tribunal on 29 August 2017, the claimant brought complaints of unfair dismissal, outstanding entitlement to holiday pay and outstanding entitlement to notice pay. The claim was brought against SouthEastern Trains but the correct name of the respondent is London and South Eastern Railway Ltd trading as SouthEastern. In its response presented to the tribunal on 13 November 2017, the respondent has denied that it had unfairly dismissed the claimant.
2. Whilst the respondent did not address the holiday and notice pay complaints in its response, the claimant's representative today indicated that these two matters were not pursued as individual complaints. Any

outstanding entitlement would form part of the compensatory award for unfair dismissal. I therefore record that the complaints in respect of holiday pay and notice pay are dismissed on withdrawal.

Issues

3. I was provided with a list of issues by the claimant's representative. I was also provided with a proposed list of issues which had been drafted neutrally by the respondent's counsel to distil the positions taken by both parties in the pleadings and in the claimant's witness statement. I was further provided with an outline response to the proposed list of issues by the respondent's counsel. These documents deal with unfair dismissal liability and remedy.
4. I do not propose to set out the issues in detail in my Judgment but will refer to those documents if necessary. Essentially, the issues arising in the unfair dismissal complaint are as follows: what is the potentially fair reason for dismissal; does the respondent meet the test of reasonableness taking into account the principles set out in British Home Stores v Burchell [1978] IRLR 379 and the band of reasonable responses test? The respondent submits that the potentially fair reason for dismissal pursuant to section 98 of the Employment Rights Act 1998 ("ERA") is conduct. The claimant's representative rather confusingly submits in his list of issues that the claimant concedes that there is a potentially fair reason but it is also to do with "*his capability/performance rather than conduct in all the circumstances of the case*". In any event, the claimant's representative orally submits that any misconduct did not amount to gross misconduct. I think it fair to say that the claimant disputes the reason put forward by the respondent.
5. The claimant is now seeking compensation only. Given that the claimant's witness statement does not deal with his attempts to find alternative employment or as to any further income that he has received and there are no documents in the bundle in support, I decided to deal with liability only and remedy at some later date if it became necessary.

Evidence

6. I heard evidence from the claimant and on behalf of the respondent from Joanna Donegan and Danny Hackett by way of written statements and in oral testimony.
7. I was provided with an agreed bundle of documents which had been prepared by the respondent and so I will refer to as "R1" where necessary. At the end of the hearing, I was also provided with a bundle of authorities by the respondents counsel. The claimant's representative provided an updated schedule of loss.
8. The parties indicated that during the course of the evidence they might wish to show CCTV footage of the incident which led to the claimant's dismissal. I advised that this would only be possible if they provided equipment on which to view it.

Comment

9. I would comment that I had to exercise increasingly stringent time-tabling because of the length of time the claimant's representative took in questioning the first witness, Joanne Donegan. Indeed, he did not lead the claimant's case until 3.40 pm and we sat until 5.20 pm in order to finish all of the evidence and submissions. This impacted on the time available to the respondent's counsel to cross examine the claimant and for closing submissions. The claimant's representative appeared to have legal training and whilst I initially exercised some leniency in any event I had to impose firmer control in the afternoon. The main difficulty was that despite my warnings, the claimant's representative was repetitive in his questions of the respondent's witnesses and made repeated asides/comments, many of which were unsupported by evidence, unnecessary or better suited to submissions if at all. I did ask him at one point for who's the benefit he thought these asides/comments were for?

Findings

10. I set out below the findings of fact that I consider relevant and necessary to determine the issues that I was required to decide. I do not seek to set out each detail provided to the tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.
11. The claimant, Mr Soile, is black. He was employed by the respondent, London & South Eastern Railway Ltd, as a Customer Services Assistant from for 4 August 2008 until his dismissal on 19 April 2017. At the time of his dismissal he was working at London Bridge railway station. He is referred to by the respondent in the documents before me as "Tunde" or "Tundy".
12. It is clear that the claimant loved his job and as he said on a number of occasions during the meetings he attended and in his witness evidence he was very passionate about his job and vigorous in executing his tasks not least in respect of preventing passengers from travelling with valid tickets. His End of Year Summary at R1 200-201, which was conducted by Leighton Tucker, the Station Manager for London City, on 21 January 2015, indicates that the claimant was thought highly of. He was voted employee on the month on five occasions. He had no disciplinary warnings. Indeed, these matters were not disputed and the focus of the respondent's concern was as to those matters relevant to and leading to his dismissal as set out below.
13. The Station Manager London City responsible for London Bridge railway station is Joanne Donegan. Ms Donegan has been manager for nine years and has conducted in excess of 50 investigations of different sorts. She has received training on attendance at work, human resources policies and procedures and on how to conduct internal investigations.
14. I was referred to a copy of the claimant's Statement of Terms and Conditions signed and dated 4 August 2008 at R1 30-39. Clause 13 refers

to the respondent's Codes of Conduct, Disciplinary and Grievance Policies. The Codes of Conduct is stated to be *"incorporated in the Employee Handbook, Section 4 and will be given to you during your induction"*. Extracts from the Codes of Conduct effective from 1 September 2017 and updated August 2013 are at R1 42-49. An extract from the respondent's disciplinary procedure dated August 2013 is at R1 50-58. The respondent's Reducing Workplace Violence Policy dated February 2008 is at R1 59-63. The document at R1 64 is signed by the claimant and dated 10 January 2013 and confirms that inter alia he received the respondent's codes of conduct and that it was his responsibility to read the information signed for. Indeed the claimant accepted that he had received these documents.

15. In cross examination, the claimant was specifically referred to a number of paragraphs within the Code of Conduct and accepted their contents. These are as follows:

15.1 At R1 44, the last three paragraphs, which state:

"If you fail to meet standards, despite counselling, training and/or informal disciplinary action as appropriate, you could face formal action under the disciplinary procedure.

Breaches of the rules might be regarded as gross misconduct, as the seriousness of the disciplinary offence determines whether the misconduct is gross and depends on the facts.

In cases of gross misconduct the formal disciplinary procedure will be used and may lead to dismissal without notice. Examples of what actions may constitute gross misconduct can be found on page 20 of this section."

15.2 R1 47 at paragraph 3.4 which states:

"Whilst in view or earshot of customers it is essential that you act in a professional manner at all times."

15.3 R1 48 paragraph 19.4 which states:

"You must adhere to the Company's policies and procedures."

15.4 R1 49, the following examples of gross misconduct:

"Deliberate or negligent contravention of any Company rules or procedures

Threatening, violent or indecent behaviour including persistent or serious racial or sexual harassment"

16. I was specifically referred to the respondent's "Hands-Off" Policy at R1 60 which says as follows:

“To assist with reducing the risk of workplace violence the Company has a strict “hands-off” policy. What this means is:

Never resort to using physical force except in self-defence; any such force must be reasonable given the circumstances. That means that it must be both proportionate and necessary. If that means allowing a ticketless traveller to pass, that is preferable to an employee being assaulted. It does not mean that employees must suffer the use of physical force against them without being allowed to protect themselves. If employees find themselves in a confrontational situation they should always take two steps backwards. This will show that they are not being confrontational, and if they needed to use force to defend themselves it will help to show that they were not attacking.

However, it is recognised that the Southeastern Railway Enforcement Officers have been accredited by the Chief Constable of British Transport Police under the Railway Safety Accreditation Scheme and have a more interventionist role in supporting the safety and security of passengers and staff whilst on our stations and trains.

These employees have been provided with additional enhanced training for dealing with incidents of conflict and other situations, which may result in confrontation. For example, the ejecting of unruly persons from trains/stations, arresting suspected offenders, issuing on-the-spot fines in the form of Penalty Notices for Disorder, pursuing suspected offenders and taking part in joint crime operations with British Transport Police.

In these situations, the foregoing ‘Hands-off’ policy may be varied so as to allow for employees to carry out their duties in a manner which is both effective and safe in the interests of themselves and others and in line with the skills and techniques that have been acquired through training provided by persons who have been approved by the police for this purpose.”

17. The claimant did not dispute having received this policy and accepted that he had to adhere to it. In cross examination he accepted that the only time that it is acceptable to use physical force is in self-defence and that if this was not the case he should let someone through ticket barrier even if they had no ticket. He further accepted that in a confrontational situation he must always take two steps backwards. He also accepted that he was not a Southeastern Railway Enforcement Officer.
18. I was also taken to R1 60 policy at paragraph 6 Personal Safety which states as follows:

“The Company fully recognises the potentially damaging effects of violence on individuals, work performance and the organisation as a whole and is committed to reducing it as far as practicable. However the Company expects its employees to avoid initiating or provoking violent situations in dealing with customers, contractors and fellow employees.

6.1 Precautions

There are occasional situations where personal safety may be compromised unless some simple precautions are taken. This is particularly so when attempting to regulate the conduct of others, for example checking tickets, discouraging anti-social behaviour or enforcing byelaws. Assaults on staff are rare, but individuals can always take practical steps to minimise the risk of an incident. For example always stand behind gates, not in front of them, this will reduce the risk of attack or injury and allow the individual room to move away."

19. I was also referred to the claimant's Job Description signed and dated 26 May 2009 at R1 40-41. The main purpose of the role of a Customer Station Assistant is to role is:

"To deliver a safe, clean and efficient retail environment ensuring that the punctual departure of train services and Local Safety Directory through the effective deployment of staff. In addition promoting all relevant marketing literature and service information and providing the highest possible standards advice, information and service to our customers whilst protecting our sources of revenue through a high visible presence."

20. The claimant's role is stated to be non-safety critical and part of his duties involves carrying out *"ticket checking duties without compromising safety"*.
21. A more recent version of the claimant's job description is 71-75.
22. My understanding of the claimant's role is that he maintained a presence at the ticket gates or barriers which separate the station foyer from the station platforms, provided advice and assistance to customers and also his present was intended to seek to ensure that passengers had valid tickets for travel.
23. The claimant's line manager was to the Station Manager, Ms Donegan.
24. During the course of his employment, there were a number of incidents involving the claimant. These were introduced in evidence by Ms Donegan. These matters form the background to the incident for which he was dismissal. For this reason I set them out chronologically below.
25. On 29 May 2013, the Duty Station Managers Log records an incident in which the claimant was accused of assault by a passenger. The claimant denied the allegations made. There was no CCTV evidence. The matter was not taken any further. But a copy of the log was kept on the claimant's file. The log is at R1 66-68.
26. On 31 July 2013, the Duty Station Managers Log records a complaint made by a female passenger against the claimant in which she accused him of shouting at her and aggressive and intimidating conduct. This was witnessed by a Revenue Protection Officer and a British Transport Police ("BTP") officer. The log is at R1 69.
27. Following that complaint, Mr Tucker met with the claimant on 2 August 2013. In his letter to the claimant sent following the meeting, it is apparent

that the claimant denied shouting at the customer and said that he was shouting at a colleague to assist him. The letter records that Mr Tucker explained to the claimant that he should not be shouting in the presence of customers because it was unprofessional. He also explained that even if the claimant felt he did nothing wrong, the customer could have perceived his behaviour as being rude, loud and aggressive. Mr Tucker advised the claimant that he would be monitoring his performance on a monthly basis for the next three months. This letter is at R1 70.

28. On 3 December 2014, the Duty Station Managers Log records a complaint made by a male passenger that he been verbally abused and had his hand trapped in the wide gate by the claimant. The log is at R1 82. Details of the respondent's ensuing investigation and the claimant's handwritten statements are at R1 87-92. The claimant denied any wrongdoing and Ms Donegan's evidence is that no action was taken, although copies of the documents were retained on his file.
29. On 23 February 2016, Mr Tucker held a meeting with the claimant to discuss an incident with an abusive customer the previous day during which a potential threat had been posed to both the claimant and a colleague because of the claimant's actions. From the emails at R1 94-96 there is reference to an earlier incident involving the claimant on 5 February 2016. Although the focus is on the incident of 22 February 2016, little detail of this incident is set out in those documents. However, it is apparent that Mr Tucker met with the claimant on 23 February at which he reminded him that he is not a Revenue Protection Officer and that he should be checking tickets and providing customer service. Mr Tucker also reminded the claimant that if a similar incident occurred he should take himself away from any potentially confrontational situation. He also told the claimant that safety is more important to him than the price of a single ticket from New Cross.
30. On 9 June 2016, the Gateline Daily Log records that a complaint was made about the claimant's attitude towards a female customer in which the customer alleged that he was rude and unhelpful. The log is at R1 101-103. The manager spoke with the customer and records the following:

"Tundy seems to be lacking in empathy as the lady clearly had special needs and was trying to get to see her social Worker which made it worse. I really hope some sort of action plan is implemented with Tundy as it seems Customer Service Courses are clearly not working. We have a mainly good Team on the Gates but time and time again Tundys name keep cropping up with bad Customer Service which has an effect on the rest of the Team is it makes us all look bad (sic)."
31. It was as a result of this complaint that Ms Donegan placed the claimant on an Action Plan on 14 June 2016. This was for a period of six months monitored on a monthly basis and the aim of which was for the claimant to receive no customer complaints during that period. This is at R1 104.
32. The action agreed by the claimant in the Action Plan was as follows:

"To remain calm and composed in times of disruption.

When a customer requires assistance then do your utmost to accommodate.

Remain professional and calm when an undesirable passenger approaches you. Remember not to put yourself in danger, your safety is paramount. Do not engage in an argument with them.

Pay special attention to customers who need help. Not all customers display disability, they could have learning difficulties, nervous, not good in crowded places, anxiety etc..."

33. The claimant was involved in two further incidents on 22 September and 7 October 2016. I was referred to R1 105-110. As a result, Mr Tucker spoke to the claimant on 12 October 2016. Mr Tucker's subsequent letter is at R1 107 and records the following:

"We discussed the first incident where you left the gateline with a member of the revenue team to pursue a male passenger with his child that (sic) refused to pay £1 for the child ticket onto the platform. You confirmed that you understood my instructions in regards to dealing with an incident of this nature in the future and you should not leave your gate area.

For the second incident I can confirm that this is now closed as I was satisfied with the explanation of how you dealt with the situation.

We also discussed your meeting with Jo Donegan on 14 June 2016 in regards to the agreed action plan.

In line with our company Vision, mission and Values you agree there would be no repeat first incident.

Our Vision: Delivering our best ever passenger experience.

Our Mission: 85% by 2018.

*Our Values: 1) We make the difference together
2) We aim to be the best
3) We care passionately about our people and our passengers"*

34. On 16 January 2017, Mark Lewis-Russell, the Team Leader London Bridge, made an entry in the Gateline Daily Log (at R1 111 as follows:

"Someone needs to have yet another word with Tundy on the way he deals with passengers, he nearly got smacked by a female passenger as he tried to block her bath (sic), I had to tell him to walk away after he chased after her then tried to block her path, and with a rather big boyfriend getting anxious it could have ended so differently. What part of not getting so involved does he not get?"

35. There is a handwritten note at the foot of the log which Ms Donegan states and I accept is a record of Mr Tucker's conversation with the claimant:

"Spoke with Tunde re not being revenue protection officer".

36. This is signed and dated 18 January 2017.

37. The incident which led to the claimant's dismissal by the respondent took place on 10 February 2017 at London Bridge station. That day the claimant was working at gates by the London Underground station entrance/exit. The parties referred to the "unpaid side" meaning the side prior to accessing the railway platforms and the "paid side" meaning platform side. They also refer to "doubling up" or "surfing" which is the situation where a ticketless passenger pushes or goes through the ticket barrier at the same time as a passenger with a ticket.

38. On 10 February 2017, Ms Donegan received a telephone call from Mr Russell-Lewis, asking her to investigate an incident involving the claimant.

39. Ms Donegan initially obtained a copy of the CCTV evidence and viewed it briefly and then obtained a copy of the Gateline Daily Log which had been completed by Judy Lynch, the covering Team Leader. This document is at R1 126 and states as follows:

"Around 16.30 this evening there was an incident involving Tunde and two female passengers, there was a heated verbal conversation between them resulting in a code 1 as Tunde was assaulted. BTP were called by myself and C0. By the time i approached Tunde who was at the top of the stairs to platform 9, he told me that the two passengers did not have a ticket and told him that their bag was stolen, that's when the verbal and physical assault took place, i asked Tunde if he was ok and to come off the gates that's when the BTP asked Tunde to go and do the statement with them. Tunde came back about 18.55 and was ok to do a statement for Southeastern and go with me up to see Mark, who asked if he was ok and did he want to go home, which Tunde said Yes to both, he was offered a taxi but said he would take the bus and be in tomorrow (sic)."

40. Ms Donegan also obtained a copy of the Station Managers Log which had been completed by Mr Lewis-Russell and is at R1 127. This states the following:

"At approx 16:25 hrs a Code 1 was called to the Main Gate which I never heard on the Radio. When I happened to come down the gates I saw Judy Lynch who said she was trying to call me as Tundy had been assaulted on the Gates. 5 BTP Officers came on scene and dealt with the problem. Tundy was taken to the Police Station to make a statement about the incident, while I did an investigation with the BTP to find out the facts. My initial investigation turned up 2 versions of events that happened. Tundys version states that he was just assaulted by 2 teenage girls and never laid a finger on them. The CCTV I saw with the BT Police sees differently. I shall let you be the Judge of it. He also left his place of work (the barriers) and ran up to Platform 9 after them. I have had a statement from himself and

Rahman who was his colleague on the gate with him. After speaking to the BT Police they said that the girls could in fact counter allegation him back so it depends on what he has said in the statement to the BT Police what action they decide to take. I gave Tundy duty of care with Judy Lynch as a witness. He did not want a Taxi home and said he will be in tomorrow for his RDW he signed out and went home on his own account after signing out. All statements of been sent to Leighton Tucker to deal with on Monday (sic)”

41. Straight after the incident, the claimant was interviewed by the British Transport Police (“BTP”). The record of this interview was not available to the respondent.
42. The claimant completed an Operation Incident Report which is at R1 128. In this he states as follows:

“On 10/2/17, I was at underground gate 2 Asian ladies (age:16-20) came to me and asked to be let in. I asked for their ticket, they said they have none because they lost their purse. I asked them to go to the Ticket Office or report to Police, they said they had told Police about it I asked them for the Crime note they replied they have none and one of them double-up with a ticket passenger and the other was still on unpaid side trying to double-up which I said she cannot. At this point the one who was successful in double-up started to be aggressive, kicking me and knocking my back, took off my cap, calling me names until the other one was able to double-up and ran to platform before BTP came and entering Charing X train on the platform around 16.36 hrs (sic).”

43. Mr Mohammed Imran Rahman who was on gateline duty with the claimant at the time also completed an Operation Incident Report which is at R1 129-132. In this he states as follows:

“I was manning the gates from the inside when a member of network rail agency staff approached me & said “call the Police”. I then asked her why & she pointed to my right where I saw Tunde on the unpaid side of the gateline at this stage I didn’t notice anything untowards, however he was shouting to me to call the police. I recalled minutes before some officers partrolling the station behind me & ran towards that area to see if I could see them. I couldn’t see them so I asked colleagues manning the gateline oppisite the ticket office to radio for police. I then went back to the gateline which I was manning to notify Tunde the police where on the way. When I got back Tunde & one of the assailants was on the paid side of the gate and Tunde showed me a footprint on his trousers. At this point I realised it was a code 1 incident & went back to the colleagues on the other gateline to let them know a member of staff has been assaulted & we may need assistance (sic).”

44. Ms Donegan met with the claimant on 11 February 2017. She enquired how he was and he replied that he was fine but had seen his GP who recommended that he get his leg x-rayed. She advised him that having read Mr Lewis-Russell’s and Ms Lynch’s logs and having taken into account information relayed back from the BTP that a counter-allegation of assault

may be laid against him, she was suspending him from work pending further investigation. She asked if he agreed to her viewing the CCTV footage as part of her investigation and he agreed. She was then under the mistaken belief that she needed his permission to do so. She read out the suspension letter to him and arranged a date for a further meeting to be held on 15 February 2017. Copies of the minutes of the meeting and suspension letter are at R1 133-135.

45. Thereafter, Ms Donegan went through the CCTV footage in some detail and became extremely concerned that it did not tally with the claimant's report of the incident. In particular, his report suggested that he had been attacked but the CCTV footage showed that he had pursued the two passengers and been quite physical with them. She found that the CCTV footage clearly showed the claimant shoving one of the passengers and using his body to block her from accessing the gate. As such she believed this to be in breach of the respondent's Hands-Off Policy.
46. On 15 February 2017, Ms Donegan met with the claimant, who attended with Mick Carney, his trade union representative. Ms Donegan describes this as a preliminary meeting. At the meeting Ms Donegan told the claimant that she had viewed the CCTV footage and asked him if he wished to add anything to his Operational Incident Report. He said no. She then told him that having viewed the CCTV footage, the incident would be going forward to a formal investigation because it did not correlate with his own report. I was referred to the notes of the meeting at R1 136 and Ms Donegan's letter to the claimant dated 15 February 2017 confirming that he was required to attend a fact finding meeting on 27 February 2017 at R1 136 & 137.
47. Ms Donegan also met with Mr Rahman on 15 February 2017 and asked him for his account of the incident on 10 February. I was referred to the notes of meeting at R1 138-139. Mr Rahman's account is somewhat confusing to read. In her witness evidence, Ms Donegan understood him to say the following and this appears to be a reasonable interpretation in the wider context. He was with the claimant by the gates by the underground station, the claimant being on the unpaid side. One of the agency staff told him to call police and he asked radio for support. He went over to the claimant who was then on the paid side. The claimant showed him his leg with a footprint on his trousers. At this point Mr Rahman realised the claimant had been attacked. Two female passengers started beating the claimant. They ran up platforms 8 & 9 and claimant went after them. Ms Donegan asked Mr Rahman whether he seen claimant doing anything, like pushing. He replied that the passenger on the unpaid side said to him "*can you tell him not to touch her*". Ms Donegan asked Mr Rahman if the claimant might have done something to make the passenger say this, but Mr Rahman said he did not know. Ms Donegan asked Mr Rahman where the passenger who kicked the claimant was and he replied that both passengers were on the paid side and both set on the claimant simultaneously. They beat the claimant up, push him, his hat fell off and it was really violent.
48. On 16 February 2017, Ms Donegan met with Wissem Aloui, a Network Rail Customer Assistant. The notes of this meeting are at R1140-141. Mr Aloui's account is also somewhat confusing to read. Ms Donegan sets out

in her evidence what she understood him to mean and again this appears a reasonable interpretation in the wider context. Mr Aloui told her that he was working on the helpdesk and he could see the gateline where the claimant was working. He could hear two girls swearing at the claimant. The passenger that the claimant was dealing with was on the unpaid side and asked to go through free. He heard shouting and saw the other passenger on the paid side next to the gates. The claimant was not letting her through and the other girl came from behind, held the claimant's neck and they (presumably the two girls) were swearing and kicking him. The claimant was pushing one girl against the gate and the other girl was behind. They were shouting and screaming, one girl telling the claimant "*you fucking cunt, leave my sister, let her go*". One of the girls the claimant's neck, they were being very vicious and calling him "*old cunt, old man*". Mr Aloui called for help on his radio. Two or three minutes later the two girls ran onto the platform. The claimant followed the girls and he went with him. He told the claimant to tell the dispatcher to hold the train. The girls jumped onto the train to Charing Cross. Mr Aloui saw Ms Lynch and asked if the train could be held but she said no.

49. On 16 February 2017, Ms Donegan also met with Ms Lynch. The notes of this meeting are at R1 142-143. Ms Lynch explained that she was the team leader that night. She first became aware incident when she received an unclear message in which he heard the words "code 1". When she answered, she was told that something was happening on the main gates at the back. She left her office and at the bottom of platform 8 was met by Mr Aloui who told her that the claimant had been assaulted. She ran up to the claimant on the stairs, asked him if he was all right and told her that he been kicked and punched. She asked him if he was hurt and put his hands up saying "*I didn't touch anyone*". They went down the stairs and were met by four British Transport Police, the Southern manager and Mr Aloui. The claimant again said "*hands up they were women, I didn't touch anyone*". Ms Donegan asked Ms Lynch if she thought this was odd and she said only afterwards she realised that what the claimant said was "*a bit weird*". The claimant then went with the BTP to make a statement. It was not possible to stop the train because the BTP were not there.
50. On 16 February 2017, Ms Donegan also met with Mr Lewis-Russell. The notes of their meeting are at R1 144-145. He explained that he was acting as covering Station Manager that day. He was not aware of the code 1 because he was on the southern side of the station when it was called through. He came downstairs and saw Ms Lynch rushing around, asked her the matter was and she told him claimant had been assaulted. He went over to Mr Rahman and asked him what had happened. Mr Rahman told him he did not see much and that all he had heard was one of two females shout "*tell him to get off her*". He then went up to the platform to see if the platform staff had seen anything. They told him that the claimant came to platform 9, asked where the train was going and they said Charing Cross, to which he responded okay and went back downstairs. By this time the BTP had arrived, said they needed to take claimant away to make a statement and that they wanted to view the CCTV footage. The claimant described the two girls to the BTP as Somalian with ginger hair. He reviewed the CCTV footage with the BTP to identify the claimant and possibly the

females in question. The incident that he saw on the CCTV was not the same account the claimant gave. Mr Lewis-Russell also told Ms Donegan that the claimant turned round to the team leader and said *"they were girls I didn't touch them, I promise you I never laid a finger on them"*. From the CCTV footage he could see the claimant push one of the girls, either pushing her out of the way the gates or to try to stop her getting through the gate. The claimant told him that one of the girls kicked his leg and although he could see the scuff mark on the claimant's trousers, the claimant did not say that he had any injury and his leg did not appear to be hurt.

51. Ms Donegan held a meeting with the claimant on 10 March 2017. He was again accompanied by Mr Carney. I was referred to the notes of this meeting at R1 147-149.
52. At the meeting the claimant explained the following. He remembered what happened but it happened very quickly and the two girls were calling him names. He told them to get a note from the police or go to the ticket office. One was swearing. He may have used his hand and it may have touched her, but it happened too quickly. He used his arm to save his guard, which Ms Donegan understood to mean that he used his arm to move her out of the way. Ms Donegan asked the claimant why he had blocked one of the passengers. He said he did not want her to come through. He told her to calm down as the barrier could hurt her. He said he would have opened the barrier. Ms Donegan asked him about this because it was apparent from the CCTV footage that he had not opened the gate for the passenger. The claimant said he did not want a problem, he has said *"don't call me names"* and that his arm might have touched her. Mr Donegan said that they would go through the CCTV footage together the following week.
53. I note that in his witness statement, the claimant states that amongst other things the girls called him a *"black bastard"* which surprised him given they were black as well (at paragraph 5).
54. The claimant also states in his witness statement that he did not believe that his job was simply to check tickets and knowingly let passengers without valid tickets go through the gates when revenue protection officers were not present (at paragraph 6). Indeed he states in the context of one of the girls doubling up through the barriers:

"So I was determined to protect the respondent's business in my role by not letting the other passenger go through the barriers, more so when they have simply refused to go to ticket office which was less than a minute's walk away to explain their predicament and thereby giving me more authority to let them through barriers for free travel."
55. The claimant also states at paragraph 8 of his witness statement that in the face of an assault on him he categorically denies assaulting anyone as it was all captured on CCTV and all he was doing was defending his job, the respondent's revenue and preserving his own safety.
56. At the meeting, Ms Donegan told the claimant that he had been spoken to about stopping people coming in and how he spoke to people. He agreed

but said he spoke politely but people thought he sounded arrogant and was shouting when he was not. I have to say that the claimant did not sound arrogant or to be shouting when he gave evidence at the tribunal hearing.

57. Ms Donegan reminded the claimant of the action plan that she had put him on the previous year following the previous incidents. She said that he had done reasonably well, but one of the actions was to remember not put himself in danger and not to get into arguments with passengers. She asked him what his trigger was and he replied that he did not let anything set him off. He said if passengers come to him and explain he would let them through. He explained that he did not open the barrier on this occasion because having told the passengers to go to the ticket office, they had said the "*F word*" and if that was the case he was not allowing them through.
58. Ms Donegan reminded the claimant that they had previously discussed not putting himself in danger. He replied that he did not think he had put himself in danger. She told him that the CCTV footage told a different story, it frightened her that he had put himself in a situation which could have been avoided. She told him she was worried and concerned by what he did and that he did not need to do it. He could (and should) have just let the passengers push their way through if that was what they were intent in doing.
59. Ms Donegan then asked the claimant about his following the girls up the platform. He replied that the girls ran up the platform after they hit him and that he left his gate as he was the only one who knew what they looked like so that if the police came he could point them out.
60. She asked him why he had said to Ms Lynch "*I didn't touch anyone*". He denied saying this and said he had not spoken with Ms Lynch. He said to Ms Donegan that he did not touch or engage with anyone.
61. Ms Donegan advised him that Mr Rahman told her that one of the passengers said to him "*can you tell him to stop touching her*", suggesting that she was concerned that the claimant pushed her friend. The claimant responded "*before that, I put up my arm; I don't know if I touched her. My arm might have touched her which I'm not denying*" (at R1 149).
62. On 15 March 2017, Ms Donegan had a conference call with Damon Colvin, the Station Manager for Southern at London Bridge. I was referred to a copy of the notes of this conversation at R1 150-151. Mr Colvin told her that he was office when he heard a panic distress radio call, he went up to platform 8 & 9 to see what was going on and was told that the people involved got on the train to Charing Cross. He went downstairs to the lower concourse and spoke to Ms Lynch who was trying to establish what had happened. The claimant told him that the girls came through the gates and one kicked him, that he could not describe them and his description of the event was sketchy. The claimant further told him that he had asked the passengers for their tickets and they just kicked him. The claimant was quite flustered and appeared reluctant to get the police involved.

63. On 17 March 2017, Ms Donegan had a further meeting with the claimant. The claimant was again accompanied by Mr Carney. I was referred to the notes of that meeting at R1 152-155. They watched the CCTV evidence together and afterwards Ms Donegan asked the claimant whether he wanted to ask or say anything before she asked him questions. Mr Carney pointed out that the CCTV footage only caught half of the incident. The claimant said the passengers came to him, said they did not have a ticket, he asked whether they had reported it to the police (presumably meaning the loss their purse or bag) and asked them to bring him the crime number or go to the ticket office. Ms Donegan told him that her main concern was why he had put himself at risk by not letting the passengers go through and the holding the gate. He said that one of them was calling him names and so in that case he said the police are coming and that they will have to wait until then. He told Ms Donegan that he did not do anything he just said go to the police or the ticket office.
64. Ms Donegan asked the claimant why he sent them to the ticket office if they said their purse or bag had been stolen. He replied that he had done this to see if they could pay at the other end.
65. Ms Donegan pointed out that after one of the girls had kicked him, he went to the gate and held onto it. It seemed to her that after the claimant had already been assaulted he put himself at further risk. She asked him why, if he felt threatened by the females, he would put himself in that situation. The claimant told her that he was hoping the police come in time, so they would know what was going on.
66. Ms Donegan asked the claimant how he would feel about working someone else. He said he would not mind. She asked him if there was a reason why he had not done a train dispatch role. He said he did not want to work nights because of his wife.
67. Ms Donegan prepared an Investigation Pack for the claimant containing the documentation, witness interviews and the documents relating to the previous incidents in which he was involved.
68. In cross examination, Ms Donegan stated that she had not read the respondent's capability policy at R1 189-199 prior to this hearing because the issue before her was a disciplinary matter. However she had read it previously.
69. Ms Donegan further explained in cross examination that her Action Plan for the claimant did not fall under any policy, it was intended as a means to sit down with a member of staff, discuss their actions and come to an understanding as to how the company could better them to do their job. She was taken to R1 193-194 of the capability policy which refers to the agreement of an action plan with an employee in order to reach the required standards within a timetable. She accepted that this was what she intended to do in her action plan with the claimant but it was not as part of this policy. She also accepted that her action plan was never reviewed or completed. However, she did not accept that the capability procedure was appropriate for the allegations arising from the incident on 10 February 2017. She

stated that in any event the claimant had been involved in the same sort of incidents on previous occasions and that it had gone well beyond an action plan. In re-examination she was taken to R1 191 of the capability policy and she accepted that the first bullet point was applicable. This states that the policy does not cover "*deliberately/wilfully ignoring instructions or producing sub-standard work*" the appropriate policy being the Discipline Policy.

70. At an early point in Ms Donegan's cross examination, the parties played the CCTV footage of the incident on 10 February 2017. The first angle was taken from a camera on the paid side of the gates. Ms Donegan stated that the assault by the claimant was at two points. Firstly, he puts his arm on one of the girls and secondly, he blocks the gate. The second angle was taken from camera on the unpaid side the gates. Ms Donegan stated that you could see the assault more clearly this side. Firstly, the claimant pushes one of the girls away having opened the gate and at this stage he could have moved away. Secondly, he pushes her back and holds her onto the gate. Whilst she was pressed by the claimant's representative to accept she was inventing facts and that there was no assault, she was adamant that you could see that the claimant clearly held onto the gate and pinned the girl to the gate even though he held his hands up. She added that the claimant was not doing his job properly and was putting himself at risk.
71. We also viewed the CCTV footage again during the claimant's cross examination. Having viewed it, the claimant accepted that he did push one of the girls but only in the heat of the moment because she called him a "*black bastard*". He also accepted that he ran over to one of the passengers to stop her coming through the barrier because she was doubling-up. He accepted that he used his hands to block the gates but she had already assaulted him and he was trying to prevent her getting through and onto a train before the police arrived. He accepted that if he had not done so he would not have been pulled back and his hat knocked off.
72. Ms Donegan accepted in cross examination that she did not check the claimant's training record, she did not need to, but she believes that Mr Hackett, the disciplinary officer, did.
73. It was put to her in cross examination that the claimant had only been given one Performance Development Review ("PDR") during his eight years of service. She was referred R1 200. Ms Donegan denied this and stated that whilst there might only be one on his file, she knew that the claimant had more than that. She was asked why she had not considered the number of PDR's that the claimant had been given during her investigation and she replied that it was not relevant to the matter before her. In re-examination, the claimant said that he had a number of PRD's, there were about five in his file but someone broke into his locker and stole them.
74. In answer to questions as to whether she thought of sending the claimant on a training course given the nature of the previous incidents, Ms Donegan replied that he had been training in 2008 when he joined the company and had been on a Passenger Services course in 2013. This was why she put

him on an action plan. The incidents were about his attitude towards customers. The two courses he had been on had made no difference. Speaking to him made no difference as well. She added that when the claimant gets involved in a situation, he gets carried away and that was why they had to talk to him. She explained that the respondent delayed in taking action because they all liked him and let things go. It was put to her that the respondent should have given the claimant the opportunity to improve. She replied that having spoken to five London managers they all agreed that this would not work. However, she accepted that she contributed to the claimant's substandard performance by not sending him on a training course.

75. In answer to questions regarding contact with the BTP, Ms Donegan stated that she had attempted to contact them by telephoning their head office but cannot recall the conversation that she had with them.
76. Ms Donegan was taken to a letter of commendation sent to the claimant by the respondent's Head of Customer Services on 23 May 2013 (at R1 65) and a thank you letter sent to him by Mr Tucker on 23 December 2015 (at R1 93). These were not included in her Information Pack. She accepted that they were on the claimant's file but that she did not include them because she did not believe them to be relevant to the matter before her.
77. In cross examination Ms Donegan explained that she made the decision to refer the matter to a disciplinary hearing having taken advice from human resources. Their advice was that the evidence overwhelmingly pointed towards a charge of gross misconduct.
78. By letter dated 5 April 2017 the claimant was required to attend a formal disciplinary hearing regarding the incident:
 - *On Friday, 10 February 2017, whilst working on the Gateline at London Bridge, you inappropriately challenged two female members of the public. The incident then escalated into an altercation which led to you assaulting one of the females involved and you also endangered your own safety.*
 - *The above is in contravention of the company codes of conduct page 7 Section 3.4. Page 19, Section 19.4, 19.13 and 19.16. This is also an example of gross misconduct as stated on page 20 under the section of threatening behaviour."*
79. The letter stated that the meeting was arranged for 19 April 2017. It warned the claimant that his future employment with the company would be subject to the outcome of the hearing. He was advised of his right of accompaniment. The letter is at R1 164-165.
80. Danny Hackett, Orpington Area Manager, was appointed to act as disciplinary officer. He has been employed by the respondent since 2005 and has held the position of Area Manager or Station Manager since 2006. He has dealt with in the region of 50 disciplinary hearings. Disciplinary

cases are conducted by a number of Area Managers. Ms Lynch requested a hearing officer and he responded to her request.

81. Prior to the disciplinary hearing, Mr Hackett was provided with and went through the Investigation Pack. He also watched the CCTV evidence.
82. In cross examination he said it was not usual for the investigating officer to provide a report or mitigation evidence, a criticism made of Ms Donegan's involvement by the claimant's representative. He was also asked whether the Capability Policy at R1 189 was applicable and he said no. He explained that seeing the investigation pack and watching the CCTV footage, as an individual case, even regardless of the previous incidents involving the claimant, it was in itself a matter of gross misconduct given its seriousness.
83. The disciplinary hearing was held on 19 April 2017. The notes of the disciplinary hearing are at R1 168-176. The claimant was accompanied by Mr Carney. Mr Hackett began the meeting by reading out the charges against the claimant from the disciplinary invitation letter. He then asked the claimant to explain exactly what happened on the day in question.
84. The claimant explained that he was working on the gateline when a lady came up to him and said her wallet had been stolen. He asked her she had reported to the police and she called him "*a cunt*". He did not respond and told her to go to the ticket office. He asked her if she had anyone who could pay for ticket on the other side. The passenger then doubled-up on the gates. He told her she could not go through, that she should not double-up as she might injure herself. He told her to go back. He said that by this time the other passenger who had already passed through the gate, kicked him and took off his hat. He said that the one who came through the gates threw his hat and started punching his back. The Network Rail staff saw that the passengers were being aggressive and called the police. The claimant had already radioed Mr Rahman, the team leader. When Network Rail said they had called the police, the two girls ran onto the platform. The claimant said he went upstairs to the platform as he was the only person who could identify them, but they had already got on the train. Later a member of the public came forward who said they had filmed the incident. The claimant asked them to send this to his team leader. Mr Hackett said to him that from reading the pack it did not appear that anything had been submitted. The claimant said that it was an emotional event, he did not know what was going on and he did not intentionally touch the passenger. He said he had been on the gate for years and was passionate about his job. He said that if someone did not have a ticket it's different, people take him for granted and he is a passionate person.
85. Mr Hackett raised his concern that from reading the pack the claimant had put himself into a really volatile situation. He told the claimant that this was a serious issue as he had endangered himself, his colleagues and the passenger. He reminded the claimant that his role was to provide customer service and not to prevent people physically coming through the gates.

86. Mr Hackett, the claimant and Mr Carney then watched the CCTV evidence together. For the purposes of this hearing, Mr Hackett has provided a number of screenshots taken from the CCTV footage to illustrate certain points in the recording. These are in R1.
87. Mr Carney pointed out that the initial altercation where the abuse started was out of shot the CCTV cameras. He highlighted that from what the claimant told them, at this point what he did was correct, asking the passengers if they have a ticket and so on.
88. Mr Kearney describes the CCTV evidence in his witness statement and where possible by reference to the screen shots as well as by reference to what took place in the meeting.
89. In evidence Mr Hackett explained that the two passengers in question have the hoods of their coats over their heads. One passenger has a fur-lined hood, the other is wearing a puffer jacket with a hood. The screenshot at R1 114 shows the claimant to the far right of the picture with the passenger in the puffer jacket in front of him. Meanwhile the passenger in the fur-lined hood can be seen trying to push herself through the second gate to the right.
90. In the meeting Mr Hackett referred to the claimant following the passengers to the gates and asked him why was he doing this when he had already been verbally assaulted by them? The claimant replied that he did not follow them he was just telling Mr Rahman that he had already told the passengers to go to ticket office.
91. In evidence Mr Hackett stated that the CCTV footage shows the claimant pursuing the passengers. He said that it is quite clear that the claimant is not going speak to Mr Rahman he is trying to stop female passengers from getting through. He referred again to the screenshot at R1 114.
92. He further stated that the claimant gets to the gate a second too late to stop the passenger with the fur-lined hood, who can be seen pushing herself through the gates. He referred to the screenshot at R1 115. The claimant then turns to stop the passenger in the puffer jacket from doing the same thing. He said that the CCTV footage then clearly shows the claimant pushing the woman in the puffer jacket away from the gate – the claimant makes a push motion and she moves backwards. He referred to the screenshots at R1 116-119.
93. Mr Hackett's further evidence was that the passengers then appear to call over another member of staff. The claimant then lets himself through the gates and approaches the woman wearing the fur-lined hood. The claimant told Mr Hackett in the meeting that he asked the woman in the fur-lined hood to move to the side and that was when she kicked him. Mr Hackett referred to the screenshot at R1 120 as showing the woman in the fur-lined hood giving the claimant a sideways kick.
94. Mr Hackett said in evidence that the passenger in the puffer jacket walks away but can then be seen returning to the gate where she attempts to double up with another passenger. As soon as the claimant spots her

rushes over to the gate to try to stop her. Mr Hackett referred to screenshot R1 121.

95. In the meeting, the claimant told Mr Hackett that at this point he was telling the passenger in the puffer jacket to get a ticket but she ignored him and trying to double- up. Mr Hackett stated that the CCTV evidence suggests and in fact the claimant rushes over to stop her from pushing through and pushes the gate closed as the passenger in the puffer jacket is trying to force a way through it. He physically prevents her from getting through. He makes himself into a human barrier so that the passenger could not push her way through. In evidence Mr Hackett referred to the screenshot at R1 122. Mr Hackett told the claimant that by doing he put himself at risk and may also have assaulted the passenger. Mr Hackett again reminded the claimant that his job was not security guard, police or revenue protection, his job is to provide a high level of customer service.
96. At this point Mr Carney stated that although the claimant made himself a physical block he was the one being attacked. In evidence Mr Hackett agreed that this was correct, the woman with the fur-lined hood comes up behind the claimant grabs him round the neck (as in the screenshot at R1 122), hits him on the head, takes his cap off (as in the screenshot at R1 123) and hits him on the head again (as in the screenshot at R124). His further evidence was that at this point the claimant appears to allow the woman in the puffer jacket to go through the gates, although he then turns round and appears to try to grab hold of the passengers (as in the screenshot at R1 125).
97. In the meeting, Mr Hackett told the claimant that he did not condone the passengers' behaviour, but asked him why he had put himself in that situation in the first place? Mr Carney replied that it was in the heat of the moment and because the claimant believes in his job. He accepted that the claimant had not done his job correctly but questioned whether the claimant had received sufficient training. He referred to previous incidents involving the claimant and asked why there had been no conflict management training offered to him? Mr Hackett said that he would find out. When asked by Mr Hackett, the claimant said that he had not had any conversations with his manager about going on any training.
98. Mr Carney suggested that because the claimant put himself in similar situations in the past which had not been dealt with by way of disciplinary action then the respondent should be consistent on this occasion. He accepted the claimant put himself into the situation, but queried why, given the previous similar incidents, he had not been taken away from these sorts of situations? In evidence, Mr Hackett stated that it was clear from the documentation he had been provided with that the claimant had been reminded about his behaviour only months before, when he was spoken to about an incident and advised not to act like a revenue protection officer. It was clear that there had been several previous incidents of a similar nature.
99. In the meeting, the claimant said that people think he talks rudely but that is just how he talks. Mr Carney said that in view of number of incidents why had no one offered claimant an alternative job? Mr Hackett replied that if

someone gets in his face on the platform is he really going to treat them differently to the gateline? He said that claimant could have a very similar situation on the platform so why would his behaviour be different elsewhere? The claimant replied that he had learned his lesson, was trying to relax himself but some people think he shouting when he is not.

100. Mr Hackett said in evidence that the claimant was not authorised to carry out safety critical work and did not have a training dispatch licence. The only other role that might be available to him at a London Terminal would have been a Cleaner/Security role. He also considered whether an alternative might be to moving outside London.
101. After a short adjournment, Mr Carney raised a number of points of concern which are at R1 172-174 of the notes of the meeting and are dealt with in Mr Hackett's witness statement at paragraphs 28-35. I do not propose to set these matters out in detail here but note them.
102. Mr Hackett asked the claimant about his railway history at R1 174 of the notes of the meeting and Mr Carney said that this might be an opportunity to move the claimant to a more suited role. The claimant said he wanted to apply for a ticket office role because he was good with numbers and people. Mr Hackett said what if someone verbally abused him in a ticket office? The claimant replied that he would not come out, that he had learned his lesson. Mr Hackett responded that he was like a repeat offender, in a way. Mr Carney stated that this could all have been prevented if the claimant was given training and this is not the job for him.
103. The claimant stated that he regretted what he had done, that he had been awarded staff member of the year five times (I think this should be staff member of the month given other evidence I heard), had received a lot of good praise for going the extra mile and was never absent from work.
104. Mr Carney stated that the claimant had accepted his regret, there had been mistakes on both sides and the issue should have been addressed before now. He said that there is a fine line between someone who is passionate and feels they have a duty to stop people "*taking the mickey*" as the two passengers did. He accepted that the claimant should not have got involved, but "*he took a bit of a kicking at the time*" and it would be a shame for him to lose his job at the same time. He said that the claimant should be moved away from the gates and given a chance on the platforms where there was less potential conflict, but that he needed to be sent on training. He concluded that this has been missed four times now.
105. Mr Hackett then adjourned the meeting to consider his decision. During the adjournment he checked what training the claimant had received over the past eight years. The adjournment was from 12:56 until 14:30.
106. In his evidence, Mr Hackett stated that it seemed to him that the claimant could not stay in his gateline role because he was potentially dangerous to himself, colleagues and members of the public. He considered redeployment but his concern was that the claimant was likely to react in the same way in any conflict situation, whether working on the platform or

on the gateline. He did not consider the claimant suitable for any customer facing role for this reason because he would still need to deal and interact with customers. He then wrote up the Written Confirmation of Hearing Form (which is at R1 177-178). His decision was to dismiss the claimant for gross misconduct.

107. Mr Hackett reconvened the meeting and read out the summary and decision sections of the Written Confirmation of Hearing Form. This is at R1 175-176 of the notes of the meeting although I note that this does not contain the last two bullet points of the summary which can be found at the top of R1 178 of the Written Confirmation of Hearing Form.

108. In his evidence Mr Hackett highlighted the following:

108.1 That he had taken into consideration that the claimant was passionate about his job but he considered this passion led to him behaving in the way he did on the day. That Mr Carney confirmed that he did not condone a hands-on approach, that the claimant had experienced aggression and was verbally assaulted prior to the hands-on incidents;

108.2 That the claimant had a previous history of this type of incident and that Mr Carney had expressed concern that following the previous incidents that further conflict training had not been offered. However the claimant had said that he had not asked for additional training at any point. Further, during the adjournment, Mr Hackett established that the claimant had attended a number of Customer Care training courses which cover customer conflict within their content. In particular, the claimant had attended a Passenger Services Training course in 2008 and a Customer Experience course in 2013. In answer to questions in cross examination, Mr Hackett said that these courses include conflict management or avoidance, but the specific conflict management course was more for revenue officers. In re-examination the claimant accepted that he had been on the courses in 2008 and 2013 but could not remember if conflict management or avoidance was included;

108.3 He recognised that Mr Carney had raised a number of points in relation to pack but he did not feel that these fundamentally affected the case;

108.4 He took into account that the claimant had worked for eight years, had a good attendance record, had expressed regret for his behaviour towards the end of the hearing, had apologised and said he had learnt his lesson. However, Mr Hackett did not believe that the claimant's behaviour was likely to change. The claimant had demonstrated a pattern of behaviour and despite several attempts to correct this including attendance at several relevant training courses, he continued to show poor judgement and understanding of his customer service role;

- 108.5 He gave serious consideration to redeployment but the seriousness of the charges remained and the potential for a much worse outcome in the future meant that he had no other option but to terminate claimant's contract with immediate effect.
109. At the end of the hearing Mr Hackett advised the claimant of his right to appeal within seven days.
110. Mr Hackett wrote a letter to the claimant dated 19 April 2017 confirming his dismissal for gross misconduct with effect from that date. This letter is at R1 179.
111. In answer to cross examination questions, Mr Hackett said that he believed that the CCTV showed the claimant had committed two assaults on the passengers. He explained that the claimant followed one of the passengers to the non-paid side and in his professional opinion, if the claimant had not done so the ensuing incident would not have happen. He continued that the claimant shoved one of the passengers on the non-paid side and that this was unacceptable behaviour. He added that when the claimant is standing on the paid side, one of the passengers comes through the gate and he puts a physical barrier between her and the gate and pens her in. He further stated that it was not the claimant's job to do this.
112. In answer to further cross examination questions, Mr Hackett explained that the role of a Gateline Assistant is primarily to provide customer assistance, customer service, to assist passengers to the gate, to deal with enquiries, to ensure the gates work and to assist with revenue. Whilst he accepted that protecting the revenue included stopping fare dodgers, he did not accept that this extended to the claimant's behaviour during the incident in question.
113. Mr Hackett accepted that whilst the action plan was in the Investigation Pack, he did not refer to it at the disciplinary meeting and was unaware whether it had been reviewed or completed as raised by the claimant's representative.
114. The claimant subsequently appealed against his dismissal. His reasons for appeal were: failure to follow procedures; severity of outcome; and misrepresentation of facts. This is set out at R1 178 of the Written Confirmation of Hearing Form.
115. The invitation letter to attend the appeal hearing is dated 27 April 2017 and is at R1 180.
116. The appeal hearing took place on 22 May 2017. It was conducted by Kim Churchill. The claimant attended and was represented by Mr Carney. I was referred to the notes of the appeal hearing at R1 182-187. The claimant's appeal was unsuccessful. I was referred to the outcome appeal at R1 188. However, neither the claimant nor the respondent gave any evidence as to the appeal beyond reference to an appeal having taken place and the being dismissed.

117. I note that at R1 181 there is a letter to the claimant from the British Transport Police dated 4 May 2017 in which he is advised that the investigation into the incident at London Bridge Station on 10 February 2017 had been concluded and it had been decided not to pursue any further investigations. The letter continues:

“It was deemed that there would be no realistic chance of a successful prosecution if the suspects could be identified after reviewing all the evidence available consisting of statements and CCTV.”

118. I note from the minutes of the appeal hearing that Mr Carney gave a copy of this letter to the appeal officer, Kim Churchill.

119. Both Ms Donegan and Mr Hackett said in cross examination that they had not read the Acas “guidance” to the events in question but had prior to his hearing (I believe that the claimant’s representative was either referring to “The Acas Code of Practice of Discipline and Grievance” or “Discipline and grievances at work The Acas Guide”, it was not clear). But both witnesses stated that they had applied the respondent’s policies.

Submissions

120. I heard submissions from both representatives and the respondent’s counsel referred to his written submissions within the Respondent’s Outline Responses to the Proposed List of Issues and authorities contained with a separate bundle.

Relevant law

121. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

‘(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,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

Conclusions

122. I first considered whether the Respondent had shown a potentially fair reason for the claimant's dismissal within section 98(1) and (2) ERA 1996.
123. The reason for dismissal will be the set of facts known to the employer at the time of dismissal or a genuine belief held on reasonable grounds by the employer which led to the dismissal (Abernethy v Mott, Hay & Anderson [1974] IRLR 213, CA).
124. The respondent's position is that the potentially fair reason is conduct and the claimant's position is that it is capability.
125. The respondent dismissed the claimant for gross misconduct because of his behaviour towards two female passengers on 10 February 2017 in which he inappropriately challenged them, assaulted one of them and endangered his own safety. A breach of the rules contained within the respondent's Codes of Conduct could lead to informal or formal disciplinary action under the respondent's disciplinary code as appropriate and might be regarded as gross misconduct (at R1 44). The respondent identified the claimant's behaviour as a contravention of its Code of Conduct at section 3.4, 19.4, 19.13 and 19.16 R1 47 & 48. It was also an example of behaviour amounting to gross misconduct (at R1 49).
126. The respondent's Capability Policy sets out "*the provisions available and the procedure to follow where an unacceptable level of performance is due to incapability*" but does not cover situations more appropriately dealt with under the disciplinary policy, specifically, "*deliberately/wilfully ignoring instructions or producing sub-standard work*" (at R1 191).
127. Both of the respondent's witnesses were quite clear and I find that they acted reasonably in concluding that the circumstances on the 11 February 2017 related to the conduct of the claimant, given the seriousness of his behaviour during the incident and that he had been involved in previous similar incidents for which he had been counselled and in Ms Donegan's case, that she had put the claimant on an Action Plan as a result of his previous behaviour. Whilst there is a reference to an action plan in the Capability Procedure this was in a difference sense and context. The respondent identified the issue against the claimant as a disciplinary issue and one involving gross misconduct.
128. I find that the respondent has shown that the potentially fair reason is to do with the claimant's conduct.

129. I then turned to consider whether this was a sufficient reason for the claimant's dismissal within section 98(4) ERA 1996. This involves an examination of both the way in which the respondent dismissed the claimant (the process followed) and the reason for the dismissal (the substance).
130. I had regard to the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) as well as the respondent's own disciplinary procedures and Codes of Conduct. From my findings I concluded that in as far as the respondent's own procedures and policies comply with the ACAS Code and were followed there is no procedural unfairness.
131. Reference was made to two occasions on which the claimant was not notified of his the right of accompaniment at meetings. One of these was to the suspension meeting which does not attract that right. The second was a meeting at which the claimant was in any event accompanied by Mr Carney, his trade union representative and is de minimis. In the circumstances I find that no procedure unfairness arises in either instance.
132. Whilst the claimant's representative made loose reference to the "Discipline and grievances at work The Acas Guide", this is not a statutory code and in any event he did not provide a copy or refer to it in sufficient detail. One concern he did raise was that notes of interviews with the claimant and witnesses were not verified and signed. Whilst perhaps desirable, it is not a requirement of the ACAS Code and in any event I find that a failure to do so does not amount to unreasonableness on the part of the respondent.
133. I then considered the substance of the dismissal.
134. I had regard to the test contained within BHS v Burchell [1979] IRLR 379, EAT relating to conduct dismissals. This requires me to consider the following:
- 134.1 Whether the employer believed that the employee was guilty of misconduct;
- 134.2 Whether the employer had in mind reasonable grounds upon which to sustain that belief; and
- 134.3 At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.
135. When assessing whether the Burchell test has been met, a tribunal must ask itself whether what occurred fell within the "*band of reasonable responses*" of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached (Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA).

136. In addition, I reminded myself that I must be careful not to substitute my own decision for that of the employer when applying the test of reasonableness.
137. The respondent interviewed the claimant, Mr Rahman, Mr Aloui, Ms Lynch, Mr Lewis-Russell and Mr Colvin, all of which were involved in different respects in the incident on 11 February 2017. Whilst the respondent did not involve the BTP in its investigation or obtain copies of statements taken, it appears that some attempt was made to do so and in evidence I was told that it was not usual to involve the BTP in disciplinary proceedings or obtain their statements. I find that the respondent acted reasonably in conducting its own investigation into the incident by interviewing staff present at the time of the incident and in viewing the CCTV evidence. The respondent did not need the BTP's involvement or statements in order to do this.
138. In any event the letter from the BTP which the claimant received after his dismissal indicates that no further action was taken because there was no realistic chance of a successful prosecution even if any suspects could be identified on reviewing the evidence. It appears that the BTP only addressed the issue as to a possible case against the two passengers.
139. The respondent also considered the previous incidents of a similar nature involving the claimant and the action taken against the claimant.
140. The relevant documentation including the witness interviews was compiled by Ms Donegan into an Investigation Pack which was considered by Mr Hackett.
141. I find that Ms Donegan acted reasonably in her endeavours to determine what had happened on the day in question. She acted reasonably in posing questions which might be considered leading in a tribunal or court of law but which did not render the investigation to be unreasonable or lead her to any unreasonable conclusions. In any event the claimant did not dispute the majority of facts which underpin the charges against him, although of course he did deny assaulting the passengers or acting improperly. In addition, I do not find that she acted unreasonably in not handing the records of interviews to the witnesses for verification and signature. The claimant was accompanied to his own meetings by his trade union representative and has not taken issue with the accuracy of the notes of those meetings.
142. Prior to the disciplinary hearing, Mr Hackett reviewed the investigation pack and CCTV evidence. He allowed the claimant and Mr Carney to comment and raise issues, he asked the claimant questions to ascertain happened and he went through the CCTV footage with them.
143. Ms Donegan was castigated by the claimant's representative for not raising mitigating factors or investigating the issue of previous training. However, as she said, this was not her role, her role was to determine what happened on the day in question and whether the matter should proceed to disciplinary hearing and then the matter was placed in the hands of the designated disciplinary officer, Mr Hackett. I find this reasonable.

144. Taking into account the circumstances including the size and administrative resources of this respondent I find that it carried out as much of an investigation as was reasonable in the circumstances.
145. Turning then to the conclusions reached from that investigation. From my findings I conclude that the respondent acted reasonably in its interpretation of the CCTV footage by both Ms Donegan and Mr Hackett. The CCTV footage that I saw plus the screenshots supports the view that their conclusions as to what they found that the claimant did were reasonable.
146. The respondent reasonably concluded that the claimant had inappropriately challenged the two passengers, the incident escalated into an altercation which led to him assaulting one of them and endangering his own safety. The respondent reasonably concluded that the claimant was acting in breach of its Codes of Conduct.
147. Whilst part of his job involved revenue protection, it did not extend to the actions that he had taken notwithstanding the verbal and physical assault on him which they were careful to acknowledge. The respondent reasonably concluded in essence that the claimant was not acting in self-defence but out of a misplaced sense of duty or as to his role in protecting the revenue which went against its policies and the advice given to him by managers on a number of previous occasions.
148. The claimant was aware of the contents in the Codes of Conduct, that if a passenger did not have a ticket and attempted to access the platforms he should let them pass. The claimant accepted that he should not have used physicality. The claimant accepted that he was attempting to stop one of the passengers from getting through the barriers. He was quite frank as to the passion he had to ensure that the respondent's revenue was protected but the respondent reasonably concluded that this went further than required and was in breach of its Codes of Practice.
149. The respondent reasonably concluded that the claimant had a previous history of this type of incident, that he had attending training which included conflict management, had received counselling on several occasions from managers as to his future conduct, had been placed on an action plan, but did not appear to have learned his lesson.
150. From my findings I conclude that the respondent formed a genuine belief that the claimant was guilty of gross misconduct.
151. Turning then to consider whether the respondent's decision to summarily dismiss the claimant for gross misconduct fell within the band of reasonable responses. The real question is not whether the tribunal would have chosen to dismiss the claimant in these circumstances, but whether the decision to dismiss fell within a range of reasonable options open to a reasonable employer. It is of course not my role to substitute my own opinion for that of the respondent.

152. The respondent considered the claimant's past training. The respondent considered the previous incidents and the counselling given to the claimant, in particular on several occasions that he was not a revenue officer. The respondent considered the claimant's eight years of service and good attendance record and that he had expressed regret and apologised having learned his lesson.
153. However, the respondent reasonably concluded that given the previous incidents and action that the claimant had not learned his lesson, he had assaulted a female member of the public and that whilst it did not condone the two passengers' behaviour, he put himself in a position where the incident escalated and potentially endangered himself and others and it did not believe that his behaviour would change. The respondent reasonably concluded that from his previous actions, the attempts to correct this and his attendance at several relevant training courses that he "*continued to show poor judgment and understanding of his customer service role*" (R1 178).
154. Whilst dismissal might be viewed as at the harsh end of reasonable options and some employers may have deal with this situation differently, perhaps by way of warning and further attendance at training, others would have dismissed the claimant summarily. Dismissal was within the range of reasonable options arising in these circumstances. On this basis I find that the decision to dismiss the claimant falls within the band of reasonable responses both in terms of the investigation and the decision to dismiss.
155. No evidence was led or submissions made as to the appeal process. But from what I can discern from the notes of the appeal meeting at R1 182-187 and the appeal outcome at R1 188, there is nothing obviously unreasonable about the process followed, the appeal officer's methodology, consideration or conclusions.
156. I therefore conclude that the claimant was not unfairly dismissed. His claim is dismissed.

Employment Judge Tsamados

24 January 2019