EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Stewart**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre**

On: **5 and 6 January 2021**

Before: **Employment Judge Gardiner**

Representation

Claimant: Ms G Cullen, counsel

Respondent: Mr H Zovidavi, counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant was unfairly dismissed, contrary to Section 94 Employment Rights Act 1996.**

2. **There should be no reduction to the remedy awarded under the principle in *Polkey v AE Dayton Services* or for contributory conduct**.

REASONS

Introduction

1. The Claimant, Mrs Stewart, was employed by London Underground Limited as a tube train driver from February 2002 until her summary dismissal on 27 January 2020. In her employment tribunal claim, she argues that her dismissal was an unfair dismissal, for which she seeks a remedy.

2. The basis for dismissing the Claimant was the Respondent's belief she had dishonestly claimed to have suffered an accident in the course of her work on 7 April 2019. The Claimant contends there were no reasonable grounds for this belief, and it was not reached after a reasonable investigation. As a result, the Claimant's case is that this was an unfair dismissal contrary to Section 98(4) Employment Rights Act 1996.

3. The Tribunal has heard evidence from Mr Thomas Naughton, Train Operating Manager, who conducted the disciplinary hearing. He decided that the Claimant was guilty of gross misconduct and the appropriate sanction was dismissal. The Tribunal has also heard evidence from Mr Chris Taggart, Head of Line Operations, who rejected the Claimant's subsequent appeal against that dismissal decision. Finally, the Tribunal heard evidence from the Claimant herself. All witnesses were cross examined and answered questions from the Tribunal.

4. In addition, both parties referred to an agreed bundle of documents. This was considered by the Tribunal in electronic form. It contained 343 electronic pages. A further email chain was admitted into evidence part way through the second of the two days allocated for the hearing, although its late introduction was opposed by the Claimant. Time was allowed for the Claimant to give instructions on this new document, and Mr Naughton was recalled to give evidence about its contents. In addition, CCTV footage was provided which showed the Claimant both before and after the point when she claims to have suffered the accident and resulting injury.

5. The parties had agreed a Chronology of relevant dates and a Cast List of key individuals who were involved in the events to which the claim relates.

6. At the outset of the hearing, the parties agreed that the Tribunal would determine whether the dismissal was an unfair dismissal; and if it was, then whether there should be a Polkey reduction in the event of a finding of procedural unfairness and/or a reduction for contributory conduct. Other remedy issues would be deferred until after a decision had been made on these initial points; and would only need to be considered if the Claimant was successful. As a result, the Tribunal has heard no evidence as to the extent of the Claimant's losses and as to whether the Claimant has mitigated her losses. The Tribunal has not considered whether, if the Claimant is successful, it would be appropriate to order the Respondent to reinstate the Claimant to her role.

Findings of fact

7. The Claimant's job title was Train Manager which required her to drive and manage trains on the London Underground network. She was based at Barking in East London and was assigned to work on the District Line. On 7 April 2019, she was driving a train along the District Line when there was an altercation between two customers whilst the train was at Gloucester Road station. This led to another customer activating the train's emergency alarm in the fourth carriage. As a result,

the train remained in the station and the Claimant was required to walk from the driver's cab through the train to the fourth carriage, to investigate.

8. The Claimant says that as she went to leave the driver's cab to attend to the incident, she stumbled and fell, injuring her left knee. This contention was not accepted by the Respondent – both in the course of the internal disciplinary proceedings and before this Tribunal. What is not in dispute is that the Claimant was able to walk through the train to the scene of the incident, and was able to reset the emergency alarm.

9. Three potentially relevant episodes are captured on CCTV footage. The first showed the Claimant opening the driver's door to the first carriage, briefly speaking to a passenger seated near the door, and then returning back into the cab. There does not appear to be any person or item obstructing the door, which is shown to open and close freely. The second showed the Claimant exiting from her cab into the first carriage and moving down the train. Again, on this second footage, there is nothing impeding the door from opening. The third shows the Claimant moving back down the train towards the drivers cab and entering the drivers cab through the door. On none of the footage does the Claimant appear to be in evident pain.

10. Whilst at Gloucester Road station, the Claimant had two conversations over the radio. The transcript of the first reads as follows:

> **Controller** – Yes 5 District control state your message over.
>
> Train 5 district controller state your message over.
>
> [There was a 17 second gap at this point between the initial question from the controller and the following response from the Claimant]
>
> **LS** - Yeh I'm at Gloucester Road, there's a fight on my train Gloucester road west carriage over.
>
> **Controller** - Yes receiving getting staff down.

11. The transcript of the second is in the following terms:

> **LS** - 005 receiving over.
>
> **Controller** - Yeh 005 what's your situation now over?
>
> **LS** - Ok ye I've got one of the guys off the train he's now out of the station, I'm now on the move. The other guys on the train that actually didn't start it, the violent one is off the train over.
>
> **Controller** - Ok received thanks for that controller out.

12. The Claimant's evidence in the course of the disciplinary process was that she had fallen and injured herself before both conversations took place.

13. Neither transcript is agreed to be a complete record of what was said on each occasion. However, it is agreed that the Claimant made no reference at this point to sustaining an injury. The Claimant continued on her journey westbound to Richmond station. She then drove the train back along the District Line heading eastwards.

14. As the train reached Hammersmith, the Claimant spoke to the controller over the radio for a third time. There is a transcript of this conversation, which started at 11:59, which is worded as follows:

> **LS** - 005 Hammersmith on the east over
>
> **Controller** - 005 district controller state your message over
>
> **LS** - Yeh I was wondering if you can help would you be able to call Edgware road and see if they have an icepack when I had the incident on my train I fell over and banged my knee and its all swollen.
> over
>
> **Controller** - Yeah five Edgware road or Earls Court, Earls Court over
>
> **LS** - Yeah sorry erm Earls court over.
>
> **Controller** - Yeah have you reported the incident on the train over.
>
> **LS** - Erm I had staff come down and told the erm told yourself that erm earlier there was a fight on my train erm but I didn't say I that id hurt myself over.
>
> **Controller** - Oh yeah I remember yeah it was you with the fight on the train you did hurt yourself during that fight did you over?
>
> **LS** - It wasn't during the fight, it was trying to get out of my cab someone was pushing against the door and it, it forced me back and I fell over and bashed my knee over.
>
> **Controller** - Yeh received I'll, I'll let the trains manager know control out.

15. When the train reached Earls Court, the Claimant handed over control of the train to a standby driver, Ms Kelle Shergold. The Claimant travelled on the train as a passenger in the drivers cab until Barking station. At Barking, she spoke to her line manager, Ms Sam Nicolaides, to make a formal report of the accident, and was asked to write an account of what had happened. She described the circumstances of the accident in the following terms:

> "I was doing Duty 407 and on train 005. At 11:09 at Gloucester Road I had a fight on my train. Called the L/C and then tried to leave my cab to attend the incident, when opening my door it felt like it was being pushed back against me and it made me fall over and smash my knee on the cab floor. I went back to reset PA's and defuse the situation, which I did.
>
> At 12pm I called the controller because I was getting back pain in my left knee. I requested an ice pack. To which I was called back and told there was no ice packs.
>
> When I got to Earls Court, the T/M called me and said he was sending a driver down to assist me back to Barking.
>
> When I got back to Barking I went and checked my knee to which it is very swollen. I asked the T/M for a ice pack and was told there wasn't any.
>
> So I have booked off so I can go home and attend to my injury."

16. She was offered a taxi to enable her to get home. She refused the offer, choosing to drive home instead. This involved a drive of about twenty minutes.

17. In stopping work when she did and heading home, the Claimant did not work for the full shift she had been rostered to attend.

18. The Claimant says she took photographs of her swollen knee on her mobile phone later that day [278/9]. These photos were shown to Mr Naughton on her mobile phone during the course of the disciplinary hearing, with a date and time stamp apparently indicating that they were taken at 15:11 on 7 April 2019. She argues that these photographs confirm she had genuinely suffered an injury because they show that her knee is bruised and swollen. The Respondent does not accept that the date and time on these photographs is accurate. This is a matter to which I will return.

19. The following day, 8 April 2019, a family friend telephoned the control room at Barking to say she was not well enough to work. The reason given for her absence, as recorded on the Claimant's Non-Attendance Case Record, was as follows [52]:

> "Lisa went to hospital yesterday and had an xray on her knee. It's thought that it may be dislocated. This was after the incident at work yesterday when a bag was obstructing her cab door. It is swollen at the moment. Alf was asked to ask Lisa to contact the desk asap with an update."

20. The Non-Attendance Case Record (NACR) is a rolling contemporaneous record of each event explaining an employee's failure to attend work. The NACR notes that on 10 April 2019 the Claimant provided a further update:

> "Lisa informed she visited an out of hours clinic. She stated that they believe her knee was dislocated and then popped back in. Nothing showed on the xray however she said there is fluid around her knee and it is heavily bruised. Her next appointment at the fracture clinic is on Monday. She will update this office next Monday or Tuesday."

21. On 19 April 2019, the NACR notes that she had attended her GP who provided her with a fit note. This was provided to the Respondent on 20 April 2019. This fit note recorded she was unfit for work until 15 May 2019. She informed the Respondent that she had dislocated her patella and was taking ibuprofen for the ongoing pain.

22. The NACR notes that there were regular updates over the subsequent days and weeks, as well as attempts to arrange an Attendance Review meeting with the Claimant. That Attendance Review meeting took place on 15 May 2019. The Claimant was accompanied by her union representative, Chris Smith. The NACR records that Train Manager, Victor Springer, had completed an occupational health referral form which gave a basic outline of the incident that had occurred on the Claimant's train and how she believed she came to injure her knee. The Claimant explained that she was due to see her GP later that afternoon so that she could decide whether she needed to have fluid drained from her knee.

23. The bundle of documents does not contain any separate record of the Attendance Review meeting apart from the record made on the NACR. There is also no referral form indicating the issues that were raised for occupational health to consider.

24. Later on 15 May 2019, the Claimant called and spoke to Train Manager Sam Nicolaides, telling her she had a hospital appointment on 17 May 2019 to have her knee drained. She had been issued with a Fit Note signing her off work for a further four-week period.

25. On 17 May 2019, she underwent her knee aspiration procedure as confirmed in a letter dated 3 June 2019.

26. On 30 May 2019 she attended occupational health [65]. This recorded that she had been off sick since April due to a dislocated patella. It did not specifically record that the dislocated patella was the result of an accident at work. Dr Santana, the OH Physician writing the report, expected that the Claimant would be able to return to work at the end of her current period of sickness absence, albeit on a graduated basis.

27. Throughout the period from 7 April 2019 until 20 May 2019, the Claimant was off work on sick leave. The Claimant received sick pay. The Respondent apparently accepted that the Claimant's injury was genuine, and that it had happened whilst the Claimant had been at work as the Claimant had described.

28. On 28 May 2019 the Claimant was sent a letter by Paul Murphy, Train Operations Manager, inviting her to an urgent meeting regarding her current sickness. He said

information had been brought to his attention that required they sit down and have a discussion. He asked her to attend on 31 May 2019.

29. On that date, the Claimant attended two meetings. The first was an Attendance Review meeting with Paul Murphy, Train Operations Manager, to discuss her current sickness absence. The Claimant was again accompanied by Chris Smith as her trade union representative. Unlike the Attendance Review meeting on 15 May 2019, there is a record of what took place during this meeting. It apparently started at 1340 and lasted twenty-five minutes. At the start of the meeting, Mr Murphy said he had been told that the Claimant was abroad last week whilst she was signed off on sick leave. He needed clarification as to where the Claimant was. Later in the meeting, he said he had heard that the Claimant was in Tenerife. The Claimant stated she had not been abroad but had been at home all week.

30. The second meeting held on 31 May 2020 was a fact-finding meeting to discuss the events surrounding the incident on 7 April 2019. This meeting was conducted by Mr Tabraiz Chaudri, another Train Operations Manager. The letter sent to her in advance of this meeting was worded as follows:

> Dear Lisa,
>
> I am sorry to hear that you have been off work since 8/4/19 with what has been reported as injured knee due to an incident on the train whilst on operational duty. I hope that my letter finds you feeling better and on the road to recovery.
>
> I would like to take this opportunity to let you know that we are here to help and support you. In order to help us do this it is important that we have a full understanding of your current situation and that you remain in regular contact.
>
> To better understand the circumstances and events leading up to your illness I am inviting you to attend the Barking depot office for a Fact-Finding-Interview on **Friday 31st[rd] May at 12:00hrs** to meet with a Trains Manager. At this meeting, you are entitled to a Trade Union representative or Workplace Colleague of your choice.
>
> In addition, this meeting will enable us; to discuss the nature of your illness and any help and support we might be able to provide to assist you with your recovery. I am also aware that you recently attended an update meeting on 15/05/19 here at RODING House.
>
> If this time is not convenient please contact me directly to discuss an alternative. In the meantime please feel free to contact me in the event of any other support you might require.

31. As can be seen from the wording of the letter, the apparent purpose of this meeting was to “help and support you”. There was no suggestion in advance of the meeting that the Claimant was potentially guilty of any wrongdoing. Nor was there any request for the Claimant to provide any documents to confirm the nature of her injury or the subsequent attendances for treatment. No reference was made to the sequence of events recorded on the NACR.

32. At this meeting, the discussion focused on how the Claimant had sustained her injury and the extent to which she was in pain in the aftermath of her accident. The following questions and answers are relevant to the matters relied upon as the basis for Claimant's dismissal:

> "TC : Could you please talk me through the incident that occurred at Gloucester Road starting whilst on the approach to the platform?
>
> LS I got in to the platform and opened the doors, a passenger flew backwards out of the train and then did karate kick back in to the train. I called the controller advising there was a fight on the train. I made a PA to advise customers not to pull the handle as I am aware of the incident. However, someone then pulled the handle. I then went to go out of the J-door however I don't know if someone was there or something was there. The door came back in hard and hit me. I was on my way out of the door when it pushed me back hard. I twisted and fell with my left leg under my bum. I ended up facing the M Door.
>
> TC You stated that you felt the J door push back causing you to fall backwards. What do you think caused the door to push back?
>
> LS I'm not sure what caused the door to be pushed back. When I got up, my knee was hurting so I could not see. I pushed my hand against my knee and it made a sound. It was a grinding sound. I pushed my knee from both sides and there was a pop sound."

33. She was asked the following question about the mechanism of the injury "You stated in your memo that you smashed your knee on the cab floor. Was it the impact of the fall that hurt the knee or did you twist your knee?". The Claimant answered "I'm not sure what it was. My knee landed on the floor and I landed on top of it".

34. In answer to the question "Were you in pain when you went back?", the Claimant replied "I was under adrenaline so I was ok. I went a couple of stations further when I felt my knee hurt. I thought I could go to Richmond and have a look at my knee but the toilet was out of order" [87]. She was asked whether she had told the controller about her accident at the time it happened, and she replied no. Asked why this was, she explained that she was dealing with a situation. The Claimant clarified that the reference in her written account of the accident completed on the same day to "back pain in your left knee" was inaccurate and she meant she "was getting pain in my knee".

35. The meeting concluded without Mr Chaudri making any reference to the concerns that had prompted the investigation or suggesting that any disciplinary action was a possibility. He did not ask the Claimant to provide any documents to confirm the extent of the injury she had suffered. He said a further fact-finding meeting may be

required in the future. No reference was made during the course of the meeting to CCTV footage.

36. On 13 June 2019, the Claimant was signed off work again. This time the reason given on the Fit Note was for a stress related problem.

37. On 20 June 2019, Mr Chaudri held a further fact-finding meeting with the Claimant. Again, the Claimant was accompanied by Chris Smith as her trade union representative.

38. The meeting started by Mr Chaudri saying the Claimant stated that the door "slammed shut forcing you to fall to the ground". The Claimant replied "I did not say the door slammed shut. It came back and hit me. I opened it to walk out came back and hit me".

39. By this stage, the Respondent had obtained the CCTV footage taken around the time of the alleged accident. The CCTV footage was played to the Claimant showing the way in which she opened the door between the driver's cab and the carriage behind, and the way that she appeared to move down the train. The Claimant was questioned about apparent inconsistencies between the account of events she had given at the first fact-finding meeting and what was shown on the CCTV footage. She said "maybe I got it wrong, maybe I fell over my bag. Nothing is clear with anything in life". She added "I can't say what made me fall over. It must have been something else then".

40. During the course of the meeting, the Claimant asked Mr Chaudri to show her the controller's camera, as he was only looking at one angle [93]. In evidence, the Claimant explained that there was a camera at Gloucester Road station which was positioned in the tunnel facing the front of the driver's cab. She believed that if footage from this camera had been viewed it may have shown how she sustained her injury.

41. Mr Chaudri did not respond to this request. As he has not given evidence to the Tribunal, it is not clear why he did not address the point that the Claimant was making.

42. During the meeting, Mr Chaudri noted that there was a time interval of 68 seconds between when the door closed for the first time and when it opened for the second time, after the Claimant had apparently suffered her injury. He asked her whether it was possible in this time for each step in the following sequence of events to have occurred - the Claimant to have fallen to the ground seriously hurting her knee, evaluated her condition and popped her knee back in to position, contacted the service controller and informed him of the incident, and then collected her handheld radio. She replied yes. She was then played the recording of the conversation with the radio controller. Mr Chaudri said "you don't sound distressed at all following a very serious fall". He was placing reliance both on the content of the transcript which was also provided to the Claimant, but also on the way in which the Claimant

had spoken during the course of the conversation. The Claimant's response was "I don't agree that I didn't sound distressed".

43. She was asked whether she considered that she had suffered a serious injury. Her response was "At the time I didn't think it was. It was only as I drove on it really hurts as adrenaline kicked in". Later, the explanation given for why she did not appear to show any signs of discomfort as she was moving around the train was "because I was running on adrenaline I expect". She was also asked why she appeared to be smiling and replied "Appendix D does not look like a smile. In the other one someone might have said something to me that was funny". She was asked why she didn't inform the service controller of the incident when she spoke to him on returning to her cab. The Claimant responded "Because I wasn't hurting as much at that point. I told him when it started to hurt".

44. In advance of the second fact finding meeting, Mr Chaudri had asked occupational health to provide advice on the amount of movement that a train operator would have immediately after dislocating their patella. Dr Chavda had provided a written response, which was read to the Claimant and was worded as follows:

> "Following a dislocated knee, the person may have severe pain and be unable to straighten the knee. They may also have swelling of the knee. But bear in mind, not everyone will have the same level of pain or limitation in movement. If someone has recurrent dislocation, then the tissue around it will stretch and the person may get used to this and not feel any pain or limitation in movement"

45. Mr Chaudri asked a follow up question as follows "Can I assume that there would be clear discomfort if this was to occur? We had someone claim this happened was caught on camera absolutely fine and then booked off of work with severe pain and swelling". The Response from Dr Chavda was "Yes, it is likely that pain would occur immediately, unusual to happen later on. But medicine is not an exact science so like most conditions, it is really a question of what can commonly occur with things". The Claimant was asked for her comments both on Dr Chavda's first and on his second answers. In each case the Claimant said "no comment".

46. Midway through the meeting, Mr Chaudri said this:

> "Based on the evidence we have just seen I cannot see how your account is accurate and I cannot see any evidence that a workplace injury occurred. Do you still stand by everything you have said during your First Fact Finding Interview and the Second Fact Find today?"

47. The Claimant's response was "Pretty much so. There is nothing I want to change with it". Mr Chaudri said "Have you intentionally tried to deceive me when asked about the alleged accident whilst on duty?". The Claimant's response was "No".

48. The Fact-Finding Meeting then went on to discuss the other part of the investigation, namely whether the Claimant had taken unauthorised holiday abroad whilst on sick leave. Mr Chaudri accused the Claimant of intentionally trying to deceive a manager when asked about journeys that had been made whilst on sick leave.

49. At the conclusion of the meeting, Mr Chaudri made the following statement; "Thank you for answering my questions today. I have deep concerns regarding the answers you have given here today and I am going to need some time to come to a conclusion". The meeting ended with the Claimant asking Mr Chaudri whether he would like her to bring "other evidence" and Mr Chaudri responding "We can look at further evidence if needed".

50. On 29 June 2019, Mr Chaudri wrote to the Claimant inviting her to a third Fact Finding Interview. The purpose of this third interview was to give the Claimant an opportunity to provide further evidence as she had indicated she wanted to do during the second Fact Finding Interview.

51. On 9 July 2019, the Claimant attended a third and final fact-finding meeting. Again, Mr Smith attended as the Claimant's representative. It started with Mr Chaudri noting that the Claimant had stated she had other evidence that she wanted to submit and that this was an opportunity for her to supply that evidence. She confirmed she understood this. Of relevance to the matter for which the Claimant was dismissed, the Claimant confirmed that she had a letter from her GP regarding the injury. This was worded as follows:

> "The pain is immediate but if reduced then can function normally especially in a stressful and fast timed situation, but later on pain can reoccur.
>
> The pain can be immediate but after depends on situation if fear for life then minimum pain. Over come by saving life."

52. In addition, the Claimant complained that Mr Chaudri had not told occupational health that the alleged accident had taken place during an incident (ie whilst she needed to attend to a fight). Mr Chaudri asked whether the Claimant wanted to submit any further documents or whether there was anything further to add and she replied she did not.

53. On 2 August 2019, Mr Chaudri concluded his investigation. His decision was to refer the Claimant for a formal disciplinary hearing, referred to as a Company Disciplinary Interview ("CDI"). He wrote to the Claimant on this date, warning her that the outcome of this process could be a finding of gross misconduct and immediate termination of her employment. This letter did not include any specific disciplinary charge that the Claimant was required to answer.

54. By that stage, the Claimant was still apparently being investigated for two matters – whether an accident at work occurred as the Claimant was alleging, and whether

the Claimant had acted inconsistently with her sick leave by travelling abroad. At some point, unbeknown to the Claimant, the investigation into the latter allegation was dropped, although this was never communicated to the Claimant at any point.

55. On 1 October 2019, the Claimant was invited to attend a CDI. The letter was worded as follows:

> • You are being charged with
> **Gross Misconduct,** in that on Sunday 07th April 2019, whilst operating Westbound Train 005 Train Operator Lisa Stewart reported having a work place accident whilst on duty. After an investigation into the alleged accident, this proved to not have happened.

56. This conduct was said to be contrary to Section 3.1.1. of the London Underground Code of Conduct Standard and to Section 3.2.1 of the Business Ethics document. The former required employees to comply with their employment contract and all LUL policies, standards and supporting guidelines. The latter stated:

> "Employees must ensure that any operational records and accounts for which they are responsible are truthful, accurate, complete and up-to-date and comply with legal and operational standards, regulations and standing orders; and that they are suitable to be a proper basis for informed management decisions."

57. The letter inviting the Claimant to the CDI enclosed copies of the documents that would be referred to at the CDI. It warned the Claimant that one outcome could be the immediate termination of her employment. It included Mr Chaudri's investigation report. This started as follows:

> "Gross Misconduct, in that on Sunday 07th April 2019, whilst operating Westbound Train 005 Train Operator Lisa Stewart reported having a work place accident whilst on duty. After an investigation into the alleged accident, this proved to not have happened.
>
> This is contrary to Section 3.1.1 of the London Underground Code of Conduct Standard, effective 27th January 2003 (Appendix A) and to and to Section 3.2.1 of the Business Ethics document (Appendix B) …
>
> By your actions you are in breach of the implied contractual term of mutual trust and confidence"

58. It then explained over the course of the following three pages why Mr Chaudri had reached this conclusion. The appendices attached to Mr Chaudri's report did not include the Non-Attendance Case Record, the record of Fact Finding Interview 3, or the medical evidence that the Claimant had provided from her GP at the third Fact Finding meeting. Whilst it included transcripts of the interactions with the radio controller, it did not include the audio recordings of these conversations.

59. It is agreed that the Business Ethics document applied to the Claimant's employment. The Claimant's contract of employment stated that the Respondent "reserves the right to dismiss without notice any employee guilty of gross misconduct in accordance with the Discipline Standard and Disciplinary Procedure" [40]. The Disciplinary Procedure did not provide examples of gross misconduct but stated "gross is the term used to describe the most serious breaches of standards, rules or procedures that jeopardise the employment contract".

60. The CDI was conducted by a panel of two, on 26 November 2019. This was Mr Naughton as first chair, and Mr Chris Brady as second chair. Mr Naughton had not originally been scheduled to conduct the disciplinary hearing. He had been asked to do so with only about 30 minutes notice as the person originally scheduled to conduct the disciplinary hearing was apparently unwell. This meant that Mr Naughton had had no more than 30 minutes to pre-read the disciplinary papers before the disciplinary hearing started. In his oral evidence, he accepted he would ordinarily have taken longer to read all the material before the start of the CDI and had not had sufficient time to do so. Mr Matt Bright attended as the Claimant's union representative on this occasion, although Mr Chris Smith was also present in an observational role.

61. The CDI lasted over three and a half hours in length, with a break for 15 minutes at around 1 o'clock. There are typed notes of the disciplinary hearing in the bundle which are a reasonably accurate record of what was said in the hearing, albeit given the length of the hearing, it is likely it is not full and complete.

62. At the very outset of the disciplinary hearing, Mr Bright took issue with the way that the investigation report had been expressed. He suggested that the words "this proved not to have happened" was leading the panel with a premeditated outcome. He stated that the role of the investigating manager was to supply facts, not provide a premeditated outcome. Mr Naughton said that this point was duly noted. He did not respond further on this topic until the disciplinary outcome letter, when he said that the panel were not influenced by the wording contained within the disciplinary charge, but only on the facts and evidence presented.

63. Mr Bright also asked Mr Naughton to explain the relevance of one of the disciplinary charges. Mr Naughton replied "I obviously can't do that right now". Mr Bright stated that twenty-six disciplinary appendices had been submitted seven weeks ago in relation to the hearing but there had been no response as to whether the information was relevant and admissible. Mr Naughton said: "I'm not certain, but when we get into it, we will discuss it".

64. As he explained in evidence, Mr Naughton saw his role at this stage as to listen to the points that were being made on behalf of the Claimant. Towards the start of the CDI, he gave the following explanation of how he would proceed:

> "Because I was brought in this morning, I will read each brief, then on each page ask if there is anything you want to bring, then we'll have your

mitigation and anything to highlight, then we'll take a break, then we may ask questions afterwards."

65. During the CDI, Mr Bright submitted the record of the third fact-finding which had been omitted from the appendices to the investigation report. He also referred to the record of the Attendance Review meeting held on 31 May 2019 (entry 66 in the notes). He asked Mr Naughton to listen to the recording of the conversation with the radio controller, and to attach significance to a 17 second delay between the controller asking the Claimant to state her message and the Claimant's response (entry 80). This 17 second delay, he suggested, was explicable because in that period the Claimant had fallen over, popped her knee back in, and then stood up. He suggested that the Claimant's mistaken reference in the third conversation with the radio controller to Edgware Road when she meant to refer to Earls Court was an indication that, by then, the Claimant's responses were not fully controlled because of the level of pain she was experiencing.

66. During the CDI, the CCTV footage was shown and the conversations with the radio controllers were played (entry 94). Mr Bright introduced further medical evidence obtained from various websites. He did so to explain how the rush of adrenaline experienced in anticipation of going, as a single female, to deal with a fight would have masked any pain from the dislocated kneecap (entry 99). He referred to photographs on the Claimant's phone said to have been taken of the Claimant's swollen knee at 15:11 on 7 April 2019, confirming she had suffered an injury at that point.

67. There is a dispute as to whether the Claimant offered to show the date and time stamp on the phone during the disciplinary hearing, or whether she was offering to lend Mr Naughton her phone. It is more likely that the offer was only to show the photos on the phone, rather than to lend the phone. Mr Naughton had not asked to borrow the phone, and it was Mr Bright who made the comment rather than by the Claimant. It is unlikely he would have offered the Claimant's phone without checking this with the Claimant first. The phone was shown to Mr Naughton at this point in the disciplinary hearing. Mr Naughton was able to see that the apparent date and time was 15:11 on 7 April 2019 (entry 108). Mr Bright stated that these photographs were taken four hours after the incident and this timing was consistent with bruising having developed by that point.

68. At this stage in the disciplinary hearing Mr Bright made various points about discrepancies in the evidence relating to a different matter, namely whether the Claimant had behaved appropriately whilst on sick leave. Mr Naughton did not close down the discussion on the basis that it was irrelevant to the disciplinary charge he was considering, at one point asking the Claimant "Did you go by train or car to an event with your daughter?". Mr Bright summed up the points he wanted to make, and then the Panel took a break for fifteen minutes.

69. After the break, Mr Naughton asked the Claimant to explain how she suffered the accident in her own words, which she did. She explained that as she set off from

Gloucester Road station she was in “a little bit of pain” not “loads of pain”. She said that the pain increased as she was heading back eastbound towards Earls Court. She explained how another driver called Kelly had driven the train to Barking and then helped her at Barking station. She had driven home and taken the photos about an hour after she arrived home. The notes record Mr Naughton asking her when she first sought medical assistance (entry 192). On balance, it is likely that the Claimant misheard or misunderstood Mr Naughton’s question and answered by reference to when she had first sought a medical certificate, given the recorded wording of the answer. She had in fact sought medical assistance on the day of the alleged accident, 7 April 2019, as recorded on the Non-Attendance Case Record.

70. At a later point in the CDI (entry 221), Mr Naughton stated as follows:

> “I understand about the adrenaline stress blockers and it being a potentially serious incident. We’ll take those as given and I won't spend a lot of time looking at them because I can understand if you did have stress-induced analgesia, that is how it manifests itself.”

71. Mr Naughton said at the end of the hearing that there was lots of stuff that he needed to go and investigate (entry 252). Mr Bright asked why no CCTV at Richmond and Barking had been obtained which would have shown she was limping at both stations (entries 254 and 256). Mr Bright added that the only reason that this evidence had not been sought was that it would establish that she had dislocated her knee and the Respondent did not want that answer.

72. The CDI ended at 13:52 with Mr Naughton promising it may be more than seven days before he responded because there was “lots of reading material” (entry 267).

73. On 29 November 2019, Mr Naughton emailed William Ponsonby, the Head of Occupational Health. He wrote that the member of staff had produced two camera pictures at the disciplinary hearing showing bruising to her left kneecap as the result of an alleged fall, in which her knee was alleged to have become dislocated. He did not attach scanned copies of the photos. He then asked Mr Ponsonby six questions, which Mr Ponsonby answered in his reply on 2 December 2019. The questions and answers were as follows:

> 1. Can the age of a bruise be assessed by specialists (photo evidence) to see if it is in line with the time line given?
> You can age a bruise to a certain extent, often you don’t see much in the first days, then they come out as black and blue, after a week or so they go yellow and fade. However not an exact science.
>
> 2. Can bruising structure be assessed to determine if it is consistent with the account of the alleged accident?
> Potentially but difficult.

> 3. Would a person be able to walk freely without exhibiting any pain following a dislocation of the knee cap if under stress?
> If the knee cap was fully dislocated unlikely, however if minimally displaced or relocated potentially yes.
>
> 4. If the answer to Q3 is yes (in any way), what sort of stress would this need to be? [This question was not answered]
>
> 5. Would an adrenaline rush or stress induced analgesia cause an individual not to experience pain (and if so for how long and under what circumstances)?
> Often you don't feel much pain at the time of the injury but it can increase later (next day).
>
> 6. How common is stress induced analgesia? Cannot say."

74. Mr Ponsonby's answers to Mr Naughton's questions were not sent to the Claimant for her comments.

75. In addition, Mr Naughton spoke to Karen Pringle, Fraud and Corruption Investigations Manager at TFL to ask her "if it is possible to change the time and the date stamp on all mobile smart phones from when a picture was taken". Ms Pringle referred the Claimant to Mr Alastair Tewarrie, who was a cyber security analyst at TFL. He advised that the time and date stamp displayed on mobile phone pictures is not a reliable or conclusive way of determining when a picture was taken. This is because the forensic properties of the image, known as the metadata, can be deleted or modified. The information provided by Mr Tewarrie was initially provided in a telephone conversation and then subsequently in briefer form in an email sent to Mr Naughton. It was briefer because Mr Naughton refers in his witness statement to being told that the timing of the photograph was not capable of being established "because the picture had been cropped". This information is not replicated in the email exchange so must only have been conveyed during the conversation. No record was made of the telephone conversation. The email from Mr Tewarrie was not sent to the Claimant for her comments. It appears that Mr Tewarrie was not asked about whether it was possible to accurate date and time a photo if the phone itself was examined.

76. Mr Naughton's evidence was that at some point after the disciplinary hearing, he "asked around the team at Barking but no-one had seen a copy of or any information about the x-ray". He explained the reason for making this enquiry as based on the reference in the Non-Attendance Case Record to the Claimant having an x-ray on her knee on 7 April 2019.

77. I reject his evidence about this further investigation because it is vague, it is uncorroborated by any documents, and it is not referred to in the disciplinary outcome letter. Whilst Mr Naughton probably looked at the Non-Attendance Case Record, given that it is referred to in the disciplinary outcome report, I find he did

not pay it particularly close attention and did not specifically focus on whether or not the Claimant underwent an x-ray at hospital on the day of the incident. Had he done so, then he would have asked the Claimant for evidence to confirm that the x-ray took place.

78. My basis for finding that Mr Naughton did not pay particularly close attention to the Non-Attendance Case Record is as follows:

    a. The NACR was not included with the documents provided with the investigation report;

    b. It was not referred to in the course of the disciplinary hearing;

    c. At one point, the contents of the disciplinary outcome letter is at odds with the contents of the NACR. The disciplinary outcome written by Mr Naughton notes "You stated that your manager never asked for [evidence as to an aspiration procedure on your left knee] but of course if they were not aware that you were having this procedure they would not know to ask". The NACR clearly records in an entry on 15 May 2019 that she was scheduled to have her knee drained on 17 May 2019.

79. There is no specific reference in the disciplinary outcome letter to, or analysis of, the timeline of the NACR entries, and specifically to whether or not the Claimant had an x-ray of her left knee on the date of the accident.

80. Although Mr Bright had asked during the CDI for Mr Naughton to check the CCTV at Barking and Richmond, I consider on the balance of probabilities he did not do so. He makes no reference to the CCTV at Barking in his witness statement. Whilst he says (at paragraph 29 of his witness statement), in the briefest of references, that "we understood that [the CCTV at Richmond] was unavailable", he does not explain what steps were taken to obtain this evidence. His witness evidence on this point is at odds with the disciplinary outcome letter which states that "this could have [been checked]", suggesting that no checks had been made [143]. There was no reference in the outcome letter to the CCTV at Barking. Contrary to Mr Zovidavi's submission, Mr Naughton was cross examined in the course of his evidence to this Tribunal about the CCTV at Barking.

81. The disciplinary panel decided that the Claimant was guilty of gross misconduct and that the appropriate sanction was one of dismissal. It provided the Claimant with an executive summary of its reasons at a meeting on 6 January 2020, and then set out its reasons in a document dated 27 January 2020. It was sent to the Claimant with a letter dated 28 January 2020.

82. The document started by providing comments on the 26 appendices provided to the Panel on behalf of the Claimant.

83. Mr Naughton made no reference to his post disciplinary hearing enquiries with Mr Ponsonby, even though answers 3 and 5 did potentially support the Claimant's case that she could have been in limited pain in the immediate aftermath of the accident.

84. The outcome letter was sceptical about the Claimant's knee photos and chose not to accept the Claimant's explanation for why they had not been provided at an earlier stage during the course of the investigation. Given that information from a cyber security analyst showed that the metadata of the photographs could not be obtained, the Panel decided that the photographs were "inadmissible as mitigation".

85. The disciplinary outcome letter then made four additional points before setting out its conclusions under the heading "Findings of the Panel". The Tribunal sets this out in full:

> "The panel have looked carefully at all of your points, appendices in the brief and to all 26 extra appendices submitted by your representative. In the original memorandum provided on the day of the incident you state that the J door was the cause of your knee injury. There has been a lot made about the wordings within the fact-finds, the forcefulness that the door closed and the extent the J door was opened in the first place. You initially alleged that the J Door caused your fall and led to your subsequent injury; however CCTV shows this did not happen and does not support your version of events. Therefore, in the second fact finding interview when shown CCTV evidence, you stated that something else may have happened and perhaps you had fallen over your bag. The timings for this incident were also discussed in detail and the panel agree that falls can happen quickly and potentially in the time-frames given. The panel accept that there was a longer delay between the closing of the J-Door and the start of communications on the call you initiated to Service Control. The panel also accept that accidents can occur within a train cab which does not have CCTV. What the panel have found most difficult to understand is your difficulty in providing an accurate account of your alleged accident, yet (and in contrast) the seemingly calm manner of your call to service control and the apparent ease at which you are able to move through the train immediately afterwards. The only point at which you get any facts wrong in your communications with service control is later when you ask to be relieved at Edgware Road and not Earl's Court. This error may have been made for a number of different reasons, but neither prove nor disprove whether or not an accident took place. In the picture appendices you appear to be smiling, and whilst the panel note this is not proof in itself of you not being in any pain, it again doesn't seem like there is any discomfort or problems straightening your left leg, which would have been dislocated just prior. The panel have looked at the following factors combined:
>
> 1. The overall time-line of all events.

2. The changes in your account, and mitigating factors that may account for some of this, e.g. time-lines.
3. The fact that you did not mention an accident or any pain or discomfort when calling the controller initially, or when changing ends at Richmond.
4. The fact that you used the normal call button as opposed to the may-day (emergency) call when making your initial call to Service Control. The delay when first speaking on this call, and your calm manner.
5. The ease at which you seem to be able to walk immediately after the alleged accident.
6. The fact that you do not seem to be in any discomfort (i.e. you appear to smile broadly and walk with ease).
7. The lack of any timely medical evidence from the date of the accident.
8. The actions you were able to undertake 2 hours or more following this incident i.e. being able to drive home.
9. The fact that you only provided a picture of your alleged injury to the CDI panel, but not to your Management team at Barking at any point during the original investigation.

On balance, the panel do not believe that these would be the natural actions and reactions of someone who has just suffered the dislocation of their left knee cap.

Whilst the panel agree that the incident itself (being an alleged fight on a train) could, in theory, cause heightened levels of adrenaline, there is no evidence to prove that this was the case or indeed that this led to stress-induced analgesia. For the reasons outlined, the panel find both charges to be proven.

The Panel have therefore considered the full range of sanctions available in this case. These are re-grading, final written warning, suspended dismissal and summary dismissal. This is rightly a Gross Misconduct charge in that you have deliberately and for whatever reason tried to deceive your management team at Barking that an accident had taken place, when it had not. This constitutes a breach of trust between yourself and London Underground in consequence.

Therefore, this leads the Panel to either suspended dismissal or summary dismissal.

The Panel have discounted suspended dismissal as being a reasonable outcome, as the case is sufficiently serious for the panel to determine that the appropriate sanction is summary dismissal from the employment of London Underground with immediate effect."

86. The reference to "both charges" was a reference to paragraph 3.1.1 of the Conduct of Conduct, and to paragraph 3.2.1 of the Business Ethics document. In reality, there was only one charge – reporting a work place accident which had not happened. At no point in the dismissal outcome report did the panel deal with the

Claimant's point about the apparent 17 second delay in answering the call from the radio controller. The outcome letter did not specifically find that an injury had not occurred. As confirmed by Mr Naughton in his witness statement at paragraph 19, the Panel made no findings about whether the Claimant suffered an injury or not. Because of this, the CDI outcome did not provide any alternative explanation as to how an injury had occurred if not as claimed by the Claimant, given the timing it was first reported, or why the Claimant would choose to misreport how a genuine injury had happened.

87. I find that the essential reason why the CDI panel chose to dismiss the Claimant was because they concluded that the Claimant had given an untrue version of events in stating she had injured herself in her cab at Gloucester Road. They did not believe that such an injury at that point was consistent with the sequence of events as shown on CCTV, coupled with the Claimant's ability to drive the train to Richmond and back to Hammersmith, and then drive her car home from Barking station.

88. On the same day as receiving notification that she was being summarily dismissed, the Claimant appealed against her dismissal. Her two grounds of appeal were expressed as 1: severity of decision and 2: misdirection. In advance of the appeal meeting, the Claimant was not asked to provide further clarification of the specific criticisms made of the reasoning which had led to the dismissal decision.

89. The appeal meeting took place on Monday 2 March 2020 and was chaired by Mr Taggart. In his role as Head of Line Operations, he had overall responsibility for the operation of the District, Circle and Hammersmith and City lines. In this role, He also regularly chaired appeal hearings on disciplinary matters. At this meeting, the Claimant was represented by a different union official, Mr Steve Connolly. Mr Chris Smith also attended, as he had at the disciplinary hearing.

90. Mr Taggart explained in his evidence to the Tribunal he saw his role as to listen to the criticisms made during the appeal hearing, and to identify from those criticisms more specific grounds of appeal. He would then address those grounds in his appeal outcome letter. He did not see it as his role to conduct a rehearing of the CDI. As he explained towards the start of the hearing, whilst he had all of Mr Bright's notes, he had not read them before the appeal hearing started (entry 8). He had however looked at the CCTV footage, from which he had formed a view, as he expressed during the appeal hearing:

> "The CCTV is the nub of the issue for me. I have looked at it over the weekend. The problem with this case, is that the CCTV is completely at odds with your description of what happened. The CCTV does not show what you said. You said the J door swung back and hit you, but the CCTV shows you had a hold of the handle all the time"

91. During the appeal hearing, Mr Connolly criticised the CDI panel for dismissing the evidence from the Claimant's GP, instead preferring evidence from occupational

health. This was a reference to Mr Chavda, given that the Claimant and his representative did not know Mr Ponsonby had been asked for his view at this point. The Claimant said: "OH were only asked how would someone react to having a dislocated knee, not about me specifically." She made the point that, having dislocated, the knee popped back in of its own accord. Mr Connolly referred to a letter from the Claimant's GP dated 20 February 2020 which contained the following information [235]:

> I was concerned to see Mrs Stewart in my surgery today. I am also appalled that my notes on Adrenaline were not taken into consideration.
>
> - Mrs Stewart's first appointment at the surgery for this injury was on 08.04.2019.
> - Mrs Stewart explained that she had an accident at work on the 07.04.2019.
> - Her bruising was on her left knee and was red which indicated to me it had happened within the last 24 hours.
> - I diagnosed this as a Dislocated Patella (Dislocated or Subluxing Patella).
> - I would like to point out that scientific evidence proves that Mrs Stewart could have continued with her incident.
> - Stress induced Analgesia would have disguised the pain temporarily.
> - The pain would have returned when the Adrenaline wore off.
> - The time frame would alter with each individual.
> - Mrs Stewart's appointment for her knee Aspiration was on 17.05.2019.
> - The knee Aspiration was a result of the Dislocated Patella which occurred on the 07.04.2019.

92. Mr Connolly also challenged the panel's finding that they did not know about the Claimant's knee aspiration procedure.

93. The Claimant submitted new photos of her knee, taken on the same rug in her house, "just to prove when and where they were taken". Mr Connolly said that the Claimant did not know how to change the date and the time on photos on her phone. He offered the Claimant's phone to give to IT to examine the phone.

94. Mr Connolly said that the panel ignored the 17 second delay in answering the call back from the radio controller (entry 38). He explained the essence of the Claimant's case in this way:

> "We have evidence to prove she injured her knee, so she wouldn't have been at work anyway. The only question is if it was as a result of an accident at work or something else. But she was injured, so there would be no point inventing the story just so she could go sick, because she would have been sick anyway."

95. Towards the end of the meeting, the Claimant submitted a statement from Ms Kelle Shergold, the driver who had taken over the train when she had told the controller she was in pain. She said "I vaguely remember her mentioning something about the knee. To be fair I drive with the cab light off and I am no medical expert but it did appear to be slightly swollen". She said that she did not notice anything when the

Claimant left the cab as she did not walk to the cab door to see her make her way down the platform when she left the cab.

96. Following the appeal hearing, Mr Taggart decided to check on his own phone as to whether he could change the date and the time on a photograph. His conclusion was that this was something that could be easily done. He did not document this further investigation or ask the Claimant for her comments. He did not refer to this in his appeal outcome letter.

97. Mr Taggart issued his appeal outcome on 9 June 2020, just over three months after the appeal hearing had taken place. He apologised for the amount of time it had taken to issue the appeal outcome. He said he had identified seven grounds of appeal based on what had been discussed during the appeal hearing, although then proceeded to respond to eight numbered points. In most cases, his decision was expressed in brief terms, expressing general confidence in the approach taken by the panel on that point, rather than providing detailed reasoning.

98. In his appeal outcome letter, he did not deal specifically with the further medical evidence provided from the Claimant's GP, Dr Aslam. Nor did he deal with the further evidence provided from Ms Kelly Shergold, the train driver who had taken over the Claimant's train to allow the Claimant to leave the shift early.

99. His decision was to dismiss the appeal and uphold the dismissal decision. He expressed his decision in the following terms:

> "I find that the CDI panel conducted a thorough hearing, and I agree with their conclusions. There is nothing that you have raised with me that would lead me to vary the sanction of the panel"

100. I find that the essential reasons why Mr Taggart rejected the appeal was his own view of the CCTV footage, coupled with his impression that the CDI panel had dealt with matters thoroughly. As stated above, during the appeal hearing, he had described the CCTV footage as "the nub of the issue". In his witness statement, he said at paragraph 11.5 "when I viewed the CCTV, this was clearly material evidence. It was good quality and clearly demonstrated that Mrs Stewart had fabricated her story. Things just did not happen as she had described". At paragraph 18, he said "The CCTV was the biggest single factor for me that did not stack up. I found it fanciful that someone could dislocate their knee, walk down a train, smile, walk back to the depot, book off, get in a car and drive home – all with a dislocated knee". In cross examination, he told the Tribunal that the CCTV evidence was "very compelling" and so he gave it considerable weight.

101. Before receiving the outcome, the Claimant had notified ACAS to initiate early conciliation on 17 April 2020 and subsequently received the ACAS Certificate, dated 15 May 2020. On the same day, 15 May 2020, the Claimant had issued these proceedings.

Claimant's submissions

102. At the outset of the hearing, Ms Cullen confirmed that the main thrust of her challenge to the dismissal decision was that Mr Naughton did not have a reasonable belief in the Claimant's guilt, and that there had not been a reasonable investigation into matters. The Respondent had acted unreasonably in inferring the Claimant's guilt from the material available and had been dismissive of evidence which the Claimant had provided, specifically a photo of her swollen left knee which was said to have been taken on the day of the accident.

103. In her closing submissions, Ms Cullen criticised the process followed at each of the three stages. She criticised the failure to call Mr Chaudri to give evidence in these Tribunal proceedings. The essence of her complaint was that there was no reasonable belief in the Claimant's guilt and no reasonable investigation. Rather the Respondent had been overinfluenced by Mr Chaudri's "completely unbalanced and very partial investigation." This had ignored the important contemporaneous Non-Attendance Case Record. The Respondent had then conducted the CDI and the appeal in a "blinkered fashion". The Claimant should have been asked to provide evidence to authenticate that she had needed an x-ray of her left knee on 7 April 2019. The Respondent was at fault for not seeking the CCTV footage of Richmond and Barking stations which would have shown that the Claimant was limping at that point. Attempts should have been made to investigate whether there was a controller camera pointing towards the train cab that could have shown the accident occurring, given that the Claimant had raised this during the course of the investigation with Mr Chaudri.

104. Mr Naughton, so the Claimant argued, came to the disciplinary hearing unprepared, given he was drafted in with little notice. Given this and his subsequent investigations, there should have been a further disciplinary hearing before Mr Naughton reached his outcome. This would have provided the Claimant with the opportunity to comment on these matters and to explain and justify the relevance of the evidence on which she was relying. He made assumptions about the Claimant walking up flights of stairs at Barking and that her decision to drive home was inconsistent with the extent of the injury, without specifically discussing these points with the Claimant. He did not take account of the fact that the Claimant had a clean disciplinary record over almost 19 years of service. There was no previous evidence the Claimant had sought to claim sick leave when it was not warranted on medical grounds.

105. Mr Taggart's appeal was unfair, argued the Claimant, because it disregarded important factual and expert evidence from the Claimant's GP, in the letter dated 20 February 2020, which had been provided as part of the appeal to support her case as to how the accident had occurred. This evidence was not even referred to in the appeal outcome letter. Mr Taggart, too, undertook his own investigations without providing the Claimant with the opportunity to comment. He was not justified in rejecting Kelle Shergold's evidence. Ms Shergold should have been asked for her evidence at an earlier point in the process.

106. Mr Taggart's evidence was wrong, at paragraph 14, to say when speaking of the panel's findings, that "the decision rationale specifically states that the Claimant may have sustained a knee injury at some point". The decision rationale was silent on this point. Mr Taggart, argues Ms Cullen, was basing this on what he had read in Mr Naughton's witness statement.

107. Finally, it was inappropriate for Mr Taggart in his witness statement (at paragraph 17) to speculate as to the Claimant's motivation for making up that an injury had happened at work. He suggested that it would have enabled her to take some extra time off work without it triggering LUL's Attendance at Work procedure. This had not been put to the Claimant for her comment, it was not referred to in the appeal outcome letter and had therefore not formed any part of his thinking in dismissing the appeal. It was a subsequent rationalisation to justify the dismissal.

108. As a result, it was an unfair dismissal. There should be no reduction to any award for *Polkey* or for contributory fault.

Respondent's submissions

109. I summarise the Respondent's submissions as follows, whilst recognising this is not an exhaustive list of the points made on behalf of the Respondent in closing submissions.

110. Mr Zovidavi maintained that the decision to dismiss was a fair one. It was reasonable for Mr Naughton to infer guilt from the factual inaccuracies in the Claimant's versions of events and from her apparent unrestricted mobility in the period after the accident as shown by CCTV footage as confirmed by her ability to continue with her employment for up to an hour, whilst not complaining about an accident any earlier than she did. The reasonableness of the decision is further supported by medical evidence showing that pain would normally follow knee dislocation injury.

111. Mr Naughton did not have a closed mind to there being an innocent explanation as confirmed by his willingness to obtain further medical evidence from Mr Ponsonby, and to see if the photos provided by the Claimant could be accurately dated. Mr Taggart is implicitly saying he accepts that there was an injury but there is no evidence to sustain that the injury happened in the workplace. That was a reasonable position to reach on the evidence before him.

112. Although the investigation that took place here may not have been perfect it was a reasonable investigation. Given that the Respondent regarded the Claimant as guilty of dishonesty, it was reasonable to regard the Claimant's conduct as gross misconduct and to dismiss her for that reason. It is not necessary for a reasonable employer to reach a conclusion as to the Claimant's motive for fabricating an accident report. This would be to impose too high a burden to expect an employer to understand why a false report was made.

113. If the dismissal was unfair, then there should be a finding of contributory fault in two respects. Firstly, for fabricating an untruthful report about an accident at work. Secondly for making so many inaccuracies in her misreporting of the circumstances of the accident.

114. Finally, Mr Zovidavi argued that, even if the dismissal was unfair on procedural grounds, a fair procedure would have led to the same conclusion. Any unfair aspects of the procedure at the disciplinary hearing stage were cured as a result of the process adopted on appeal.

Claimant's submissions in reply

115. Ms Cullen addressed the Respondent's contention that the Claimant was at fault for the inaccuracies in the explanations given as to how the accident had occurred. She contended that the Claimant would have been distracted by the stress of having to respond to a fight. This may have impacted on the accuracy of her recollection. She was trying her best to remember what occurred at that point in time, and when the errors were pointed out to her in the second fact finding meeting, she accepted she made a mistake and corrected it.

Legal principles

116. Section 98(1) Employment Rights Act 1996 provides as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason … for the dismissal …"

117. Section 98(4) provides:

> "(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."

118. It is for the Tribunal to determine, on the balance of probabilities, the reason or the principal reason for the dismissal. Conduct is a potentially fair reason for dismissal. It has long been established that it is not the Tribunal's role in an unfair dismissal case to decide for itself whether dismissal was the appropriate sanction, given the evidence presented before the Tribunal. Rather, the Tribunal has to decide whether the dismissal of this Claimant was a reasonable decision and whether it was taken after a reasonable procedure was followed. Where the reason for dismissal is

alleged to be conduct, the correct approach was stated in the case of *British Home Stores Ltd v Burchell* [1978] IRLR 379. This requires the Tribunal to consider the following issues:

a. Did the dismissing officer genuinely believe that the Claimant was guilty of the disciplinary charge alleged?

b. Was that a reasonable belief in all the circumstances?

c. Had the Claimant carried out a reasonable investigation before the dismissal decision was taken?

119. To be a reasonable investigation, the investigation has to be the type of investigation a reasonable employer would conduct, even if other reasonable employers might choose to undertake a more or less detailed investigation. In other words, it has to be within the band of reasonable investigations, given this particular employer's resources and the nature of the alleged misconduct (*J Sainsbury plc v Hitt* [2003] ICR 111 at paragraph 30). The amount of the investigation required to be a sufficient investigation will vary depending on the evidence:

> "At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required is likely to increase." (*ILEA v Gravett* [1988] IRLR 497; para 15)

120. The ACAS Guide emphasises that the more serious the allegations against the employee, the more through the investigation conducted by the employer ought to be (page 17). In *A v B* [2003] IRLR 405, Elias J noted that what would be expected of a reasonable employer carrying out an investigation into a disciplinary matter leading at most to a warning would not be as rigorous as would be expected where the consequences could be dismissal. He continued:

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.
>
> This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a

> criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances." (paragraphs 60 and 61)

121. In *Sattar v Citibank* [2020] IRLR 4 Sir Patrick Elias commented on his earlier judgment in *A v B*. Sir Patrick emphasised the ratio of *A v B*, namely the proposition that an investigation will be unfair "if it is simply conducted with the objective of reinforcing the provisional case against the employee and ignores or unreasonably fails to pursue evidence which might support his or her case".

122. An allegation that an employee has fabricated an account of suffering a serious injury in an accident at work, is a serious allegation which merits a thorough investigation. As part of that, a reasonable employer has to consider potential lines of defence identified by the employee but, depending on the facts, does not have to investigate each exhaustively. "As part of the process of investigation, the employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific enquiry into them in order to meet the *Burchell* teste will depend on the circumstances as a whole" (*Shrestha v Genesis Housing Association Limited* [2015] IRLR 399 at para 23).

123. To be a fair dismissal by reason of conduct, dismissal has to be within the range of reasonable sanctions, given the dismissing officer's belief about the gravity of the Claimant's conduct, in the context of the Claimant's previous disciplinary record, and the Respondent's own policies ranking the comparative gravity of different disciplinary offences. If a reasonable employer with the dismissing officer's belief could have fairly dismissed for that misconduct, then it will be a fair dismissal, even if other reasonable employers with the same belief may have chosen to impose a lesser sanction.

124. Even if the dismissal decision falls within the band of reasonable responses, it may still be an unfair dismissal if the Respondent has not followed a fair procedure. The requirements of a fair procedure are set out in the ACAS Code of Conduct on Disciplinary Procedures and considered in previous caselaw. The Tribunal must evaluate the significance of the procedural failing, because "it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process": *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at paragraph 26.

125. The procedural issues should be considered together with the reason for the dismissal. This is because the two interact with each other. The Tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss. Where the misconduct is serious, notwithstanding some procedural imperfections, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. When considering whether

the employer acted reasonably the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at paragraph 48, approving of dicta from Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 at 550). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.

126. Looking at the matter as a whole includes looking at the impact of the appeal process on any earlier deficiencies in the Respondent's procedure. The Tribunal should consider the fairness of the whole of the disciplinary process. Where there has been a defect at an earlier stage, the Tribunal "will want to examine any subsequent proceeding with particular care" (*Taylor* at para 47). A defect in the handling of the appeal is in principle capable of rendering the dismissal unfair (*West Midlands Co-operative Society Limited v Tipton* [1986] 1 All ER 513).

B. *Polkey* reduction

127. If procedural unfairness is the basis for a finding of unfair dismissal, in order to determine the appropriate remedy the Tribunal must go on to assess what would have happened had a fair procedure been followed. This requires a degree of speculation and requires the Tribunal to determine in percentage terms the likelihood that the result would have been the same. That percentage is then relevant in determining the appropriate compensatory award. This is referred to as making a *Polkey* deduction, after the House of Lords case in which this issue was considered, that of *Polkey v AE Dayton Services Limited*.

C. Contributory fault/Just and Equitable reduction

128. In addition, in appropriate cases, the Tribunal should consider whether the Claimant has contributed to his dismissal by reason of his conduct as a basis for reducing the amount of the Claimant's award. This issue is required by the wording of Section 123(6) Employment Rights Act 1996 in relation to the unfair dismissal compensatory award, and by Section 122(2) of the same Act in relation to the basic award. In order to be potentially capable of being contributory conduct, a causal link between the employee's conduct and the dismissal must be shown. This means that the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of that conduct.

129. The Tribunal must decide whether the conduct is morally culpable. If so, then a percentage adjustment can be made to both the basic and the compensatory awards to reflect the extent of the Claimant's moral culpability as a contributory factor in his dismissal. The extent of the reduction will be the amount the Tribunal considers just and equitable. In some cases, it will be appropriate to make a 100% reduction, such as where the Tribunal considers that the employee's misconduct

was such that dismissal was wholly justified but nonetheless feels compelled to find dismissal unfair because of procedural flaws in the dismissal procedure.

130. An assessment of contributory conduct requires a different analysis to the determination of whether the dismissal was an unfair dismissal. It requires the Tribunal to assess whether, on the balance of probabilities, the Claimant was guilty of the misconduct for which he was dismissed, or morally culpable in other respects that contributed to the sanction of dismissal (see *Steen v ASP Packaging* [2014] ICR 56 at paragraphs 12-14).

131. In *London Ambulance Service v Small* [2009] IRLR 563 the Court of Appeal suggested that Tribunals should structure their reasons in such a way as to make it clear that the contributory fault analysis is undertaken separately from the different analysis as to whether the dismissal was unfair. I have attempted to do that in these reasons.

Conclusions

132. I accept Mr Naughton genuinely believed the Claimant had fabricated the accident report she had made about suffering an injury in the cab whilst the train she was driving was at Gloucester Road station on 7 April 2019. Based on such a belief, it was within the band of reasonable responses to decide to dismiss her, notwithstanding her length of service and her clean disciplinary record.

133. The Claimant's unfair dismissal case turns on whether Mr Naughton's belief was a reasonable belief and whether it was reached after a reasonable investigation. In considering this issue, I recognise I must consider whether Mr Naughton's belief was one that a reasonable employer could reach, even if other reasonable employers may have concluded on the same evidence that the Claimant had not acted dishonestly. I must also ask whether the extent of the investigation undertaken here was within the band of reasonable investigations, given the issue under investigation.

134. A reasonable employer investigating an allegation of potential dishonesty ought to investigate the employee's potential motive for acting dishonestly in deciding whether, on the balance of probabilities, it is more likely than not that the employee was acting dishonestly rather than honestly. Secondly, a reasonable employer must also consider all the evidence reasonably available that potentially supports an honest explanation with an open mind in order to weigh the likelihood of the honest explanation against the alternative dishonest explanation.

135. Here, the Respondent failed to investigate as a reasonable employer would, in other words within the band of reasonable investigations, in both these respects. At no point during the investigatory, disciplinary or appeal stages was there any consideration of why, if the Claimant had suffered an injury to her knee outside of work, she had chosen to lie about the circumstances and allege it had happened at work. The first time this was raised was in Mr Taggart's witness statement, at paragraph 17. As a result, this potential dishonest motivation was never discussed

with the Claimant. No other potential dishonest motivation has been suggested. A reasonable investigation into the potential motivation proposed by Mr Taggart would have considered the extent to which the Claimant had already taken periods of sick leave in the recent past, such that she may have chosen to pin an accident outside of work on events at work to delay the point at which sickness absence would trigger particular stages under the sickness absence procedure.

136. The Claimant's potentially honest explanation was that at every point when she had reported on the accident, its resulting symptoms, and subsequent medical treatment, she had been honest and truthful, based on her recollection at the time. As to the mechanism of the accident, she accepted at the second fact find meeting she must have been mistaken as to whether the J door had been impeded and caused her to fall. On the Claimant's version, her accident happened quickly whilst a fight appeared to be taking place further down the train, in circumstances where it was her role to intervene. The stress of the moment may have impacted on her memory as to the precise mechanism for the fall. No reasonable employer could conclude her original version (as communicated to the controller over the radio and then recorded in writing when she returned to Barking) was dishonest rather than merely mistaken, unless it was reasonable to infer dishonesty from evidence gathered in a reasonable investigation of the surrounding circumstances.

137. The evidence relied upon by the Respondent to show dishonesty was the CCTV footage. This appeared to show the Claimant moving freely down the train to attend to the incident, and then back again. This was the essential basis on which both Mr Naughton and Mr Taggart inferred she could not have had the alleged accident moments earlier whilst in her cab, and therefore to suggest otherwise must be dishonest. In circumstances where the Claimant advanced a potential medical explanation for this range of movement, notwithstanding having dislocated her patella, a reasonable employer would at the very least have shown the CCTV footage to an appropriate medical expert. That would have enabled the medical expert to provide a view as to whether the CCTV footage was inconsistent with the alleged accident mechanism. That was never done. Instead, medical evidence was sought from both Dr Chavda and from Mr Ponsonby. This evidence in fact potentially supported the Claimant's explanation by suggesting that the adrenaline caused by the need to attend to a fight on a train might initially mask until later the pain from a dislocated and then relocated patella. However, Mr Ponsonby's evidence was never disclosed by the Respondent, nor does it appear to have been addressed at any point by either Mr Naughton or by Mr Taggart.

138. A reasonable investigation by a reasonable employer would consider the significance of the entries on the Non-Attendance Case Record. In particular, if it had been acting within the range of reasonable investigations, the Respondent would have asked the Claimant if there were records to confirm she had attended hospital on the day of the alleged accident as the NACR noted, and then subsequently attended follow up appointments as the NACR also detailed. It was the Respondent's obligation to carry out a reasonable investigation including

taking this step. It could not avoid this by placing the onus on the Claimant to volunteer medical evidence if she chose to do so, without specifically asking the Claimant to provide this particular evidence.

139. When the Claimant provided the letter from her GP dated 20 February 2020 as part of the appeal process, a reasonable employer would have specifically evaluated the significance of this evidence, in order to decide whether in the light of this new evidence, there was an honest explanation for the accident report, rather than a dishonest explanation. That was not done here, given the absence of any reference to this GP letter in the appeal outcome. This was particularly important, in circumstances where the panel's finding of gross misconduct was justified by the absence of evidence that the Claimant had high levels of adrenaline in response to the fight on the train.

140. Had a reasonable investigation taken place, it would have been established that the Claimant did attend hospital on 7 April 2019 for treatment in relation to an injury suffered on 7 April 2019; and that it was a reasonable possibility that adrenaline could have masked the initial pain; but that thereafter pain levels could have increased to a level where the Claimant could no longer continue with her work. In those circumstances, a reasonable employer could not reasonably conclude that the Claimant was guilty of dishonestly fabricating that she had suffered an accident at work.

141. In summary, the extent of the Respondent's investigation was outside the band of reasonable investigations. In the absence of a reasonable investigation Mr Naughton's belief in the Claimant's guilt was not a reasonable belief.

142. In any event, there were various procedural failings:

a. The advice received from Mr Ponsonby in occupational health was not shared with the Claimant at any point before the dismissal decision was taken, or in the course of the appeal. As a result, the Claimant did not have the opportunity to provide her comments on that evidence;

b. No record was made of the telephone cyber security advice received from Mr Tewarrie, and his email advice was not shared with the Claimant to allow her to provide her comments on this advice or offer her phone for specific forensic examination;

c. Mr Naughton made assumptions about apparent inconsistencies between the nature of the Claimant's injury in terms of her ability to use stairs at Barking station and her ability to drive home, without discussing those assumptions with the Claimant or with relevant medical experts;

d. The Claimant was not informed of Mr Taggart's own investigations with his own phone during the appeal process – namely whether the dates and times on photos could be amended. Had this been done she could have provided

her comments on the steps he took and on whether she would have taken similar steps.

143. The cumulative effect of these procedural failings was to take the procedure outside the band of reasonable procedures. This is a further basis on which the decision to dismiss was unfair.

144. However, I do not accept that the Respondent acted outside the band of reasonable investigations in failing to ask to see CCTV footage from various station based cameras:

a. Although the Claimant had asked if Mr Chaudri could show her footage from the controllers' camera at Gloucester Road during the second fact find meeting, this was not a point which the Claimant subsequently pursued during the disciplinary hearing or during the appeal. Whilst there is a dispute between the parties as to whether there was such a camera, I conclude that the likelihood is that CCTV footage from this camera (even if it once existed) would no longer be available by the point of the Second Fact Find meeting, two and a half months after the date of the incident. This is confirmed by the evidence of Mr Taggart, who stated that CCTV footage was only retained for two weeks unless kept for a specific reason. As a result, this CCTV would not even have been available if requested as soon as the Respondent's disciplinary investigation started shortly before the first fact find meeting.

b. Although the Claimant had referred in the CDI meeting to CCTV footage CCTV footage from Richmond and Barking stations, by this point it was over seven and a half months after the incident. For the same reason as CCTV evidence from the controllers camera, this evidence is unlikely to have still been available after such a delay.

145. I also reject the argument that a reasonable employer would necessarily have spoken to Kelle Shergold as part of a reasonable investigation. The Claimant had not identified Ms Shergold as an important witness. In any event, evidence from Ms Shergold was obtained as part of the appeal process.

***Polkey* reduction**

146. Given the extent of the failings in terms of the investigation and of the procedure that was followed, it is not possible to conclude there was a real chance that a reasonable employer would still have dismissed on grounds of dishonesty even if a fair process had been followed. With a fair process, there would have been clear contemporaneous evidence that the Claimant had suffered a dislocation of her left knee on 7 April 2020, for which she had sought medical treatment the same day. Given it was common ground that the Claimant had complained of significant left knee pain midway through the shift for which she had been unable to continue working, the far more likely explanation is that the injury had occurred during the shift rather than before the shift had started. On such evidence and analysis, no reasonable employer would have concluded the Claimant was being dishonest in

complaining she had an accident at work, even if her earliest accounts were not completely accurate as to the precise trigger for her fall. The failure to make a contemporaneous complaint to the controller was readily explicable by the perceived more pressing need to deal with the fight on the train. The apparent ease with which the Claimant was able to move down the train was explained by the medical evidence of Dr Chaudri, Mr Ponsonby, and the evidence of the Claimant's GP. No plausible justification had been advanced for why a long-serving employee with a clean disciplinary record would seek dishonestly to blame her employer for a genuine accident occurring out of work.

Contributory fault

147. Two potential bases for a finding of contributory conduct were raised on behalf of the Respondent. Firstly, for fabricating an untruthful report about an accident at work. Secondly for making so many inaccuracies in her misreporting of the circumstances of the accident. In both respects, the Tribunal rejects these arguments.

148. On the balance of probabilities, the Claimant suffered a knee injury at work whilst getting ready to intervene to stop a fight on her train at Gloucester Road. She complained of such an accident within an hour of when it is said to have occurred, and the genuineness of the injury is confirmed by the evidence from the Claimant's GP. It is more likely to have occurred during the course of the shift rather than before the shift started. No plausible motive has been suggested for why the Claimant would have dishonestly suggested that an injury sustained out of work was suffered during her duties. Whilst the Claimant's description of the trigger for her fall was inaccurate, in that it was not being impeded by the door to the first carriage, this inaccuracy is readily explicable by stress prompted by the agony of the moment. The Claimant accepted this initial description may well be inaccurate as soon as she was shown the CCTV footage showing how she came through this door.

149. Therefore, no reduction is made for contributory fault.

Remedy Hearing

150. In the light of the Tribunal's conclusions, it will be necessary to have a remedy hearing to decide on the appropriate remedy. Directions will be given, in a separate case management order to list a remedy hearing.

Employment Judge Gardiner
Date: 28 January 2021