EMPLOYMENT TRIBUNALS

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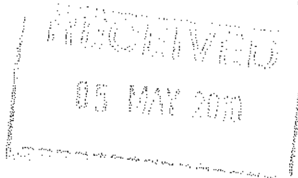

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Your Ref:
Date 04 May 2011

Case Numbers: 2330511/2010/M and 2351195/2010/M

Claimant		**Respondent**
Mr E Lynch	**V**	**London Underground Ltd**

EMPLOYMENT TRIBUNAL JUDGMENT

A copy of the Employment Tribunal's judgment is enclosed. **Please note that a Remedy Hearing has been listed on Friday 3 June 2011 at 10.00 a.m.** There is important information in the booklet 'The Judgment' which you should read. The booklet can be found on our website at www.employmenttribunals.gov.uk/Publications/publications.htm. If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

The Judgment booklet explains that you may request the employment tribunal to review a judgment or a decision. It also explains the appeal process to the Employment Appeal Tribunal including the strict 42 day time limit. These processes are quite different, and you will need to decide whether to follow either or both. **Both are subject to strict time limits.** An application to *review* must be made within 14 days of the date the decision was sent to you. An application to *appeal* must generally be made within 42 days of the date the decision was sent to you; but there are exceptions: see the booklet.

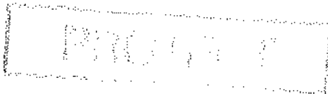
The booklet also explains about asking for written reasons for the judgment (if they are not included with the judgment). These will almost always be necessary if you wish to appeal. You must apply for reasons (if not included with the judgment) within 14 days of the date on which the judgment was sent. If you do so, the 42 day time limit for appeal runs from when these reasons were sent to you. Otherwise time runs from the date the judgment was sent to you or your representative.

For further information, it is important that you read the Judgment booklet. You may find further information about the EAT at www.employmentappeals.gov.uk. An appeal form can be obtained from the Employment Appeal Tribunal at: Audit House, 58 Victoria Embankment, London EC4Y 0DS or in Scotland at 52 Melville Street, Edinburgh EH3 7HS.

Yours faithfully,

JOHN COTTER
For the Secretary of Employment Tribunals

Case Number: 2330511/2010
2351195/2010



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE M J DOWNS
MEMBERS: Mr N Shanks
Mr AJ deLaunay

BETWEEN:

EAMONN LYNCH

Claimant

-and-

LONDON UNDERGROUND Ltd

Respondent

ON: 14, 15, 16 & 17 March 2011

APPEARANCES:

For the Claimant: Nicholas Toms, Counsel

For the Respondent: Rebecca Thomas, Counsel

JUDGMENT

UPON HEARING Counsel for the Claimant and Respondent

IT IS THE UNANIMOUS JUDGMENT OF THE TRIBUNAL THAT:

(1) The Claim for automatic unfair dismissal pursuant to Section 152(1)(b) Trade Union and Labour Relations Act 1992 is well founded

(2) The Claim for automatic unfair dismissal pursuant to Employment Rights Act 1996 section 100 (1) (b) (ii) is well founded

(3) The Claim for unfair dismissal pursuant to section 98 Employment Rights At 1996 is well founded

(4) The Claim pursuant to Regulations 4, 5 & 11 of the Safety Representative and Safety Committee Regulations 1977 is not well founded

(5) The claim of an unlawful detriment pursuant to section 146 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR") is dismissed upon withdrawal

(6) The claim of an unlawful detriment pursuant to Section 44 Employment Rights Act 1996 is dismissed upon withdrawal

IT IS THE DIRECTION OF THE TRIBUNAL THAT:

(1) This matter shall be listed for a Remedies Hearing on 3 June 2011 at 10.00 am at the London South Employment Tribunal with one day allowed.

REASONS

Identified Issues

1. The Claimant brought two separate originating applications before the Tribunal. It is useful to consider them (and the questions that arise therein) in turn.

Claim 1 (ET 2330511/10)

2. The Tribunal is asked to consider, has the Respondent failed to permit the Claimant to have time off with pay as was necessary to:

   (a) to investigate complaints by any employee he represents relating to that employee's health safety or welfare at work; and/or

   (b) carry out an inspection in circumstances where there has been a substantial change in the conditions of work since the last inspection under the Safety Regs

   pursuant to Regulations 4, 5 & 11 of the Safety Representative and Safety Committee Regulations 1977 ("Safety Regs")?

3. The request was to inspect a new driver's seat which was introduced on a trial basis on unit 3299 on 15 April 2010. The request was made on 13 May 2010 and refused on 16 May 2010.

4. As the evidence was called it was apparent that the other claims brought in this originating application were unsustainable (they were not supported by the evidence) and the Claimant withdrew complaints of unlawful detriment pursuant to section 146 Trade Union and Labour Relations (Consolidation) Act 1992 and Section 44 Employment Rights Act 1996 before he closed his case. These claims were dismissed upon withdrawal.

Claim 2 (ET 2351195/10)

5. What was the reason or principal reason for Claimant's dismissal by the Respondent. Was it:

   (a) that he had taken part or proposed to take part in the activities of an independent trade union at an appropriate time (Section 152(1) (b) TULR); or

   (b) that the Claimant, being a representative of workers on matters of health and safety at work or member of a safety committee by reason of being acknowledged as such by the employer performed (or proposed to perform) any functions as such a representative or a member of such committee pursuant to Employment Rights Act 1996 section 100 (1) (b) (ii); or

(c) his conduct on the 9th August 2010?

6. If it was his conduct, was the Claimant's dismissal fair within the meaning of Section 98(4) Employment Rights Act 1996. In particular;

   (a) did the R carry out a reasonable investigation in the circumstances of the case;

   (b) did the R have reasonable grounds to believe C was guilty of misconduct;

   (c) did the R have a genuine belief that C was guilty of misconduct;

   (d) if the R was entitled to believe C was guilty of misconduct, was dismissal a sanction within the range of responses that would be considered by a reasonable employer?

7. If C's dismissal was unfair:

   (a) should *Polkey* apply?;

   (b) should any compensation be reduced by reason of C's contributory fault?

Evidence

8. We had the benefit of an agreed bundle of evidence and we heard evidence from the following witnesses:
the Claimant
Ismael Rionda Rodriguez - Train Operations Manager (TOM) and the Claimant's line manager
Robert Smith - Performance Manager
Michael Smith - Performance Manager for the Central Line
Alana Stewart - who was the original decision-maker
Chris Taggart - Performance Manager on the Victoria Line and who dealt with the Appeal
Pat Sikorski - Assistant General Secretary of the RMT who represented the Claimant at his appeal
Brian Munro, RMT Branch Secretary on the Bakerloo line and Level 1 industrial representative.

9. We also read the witness statement of Brian Whitehead who represented the Claimant at the CDI and who was not able to give live evidence before us because we managed to finish the evidence early. We did not place much reliance on his evidence because it was mainly contained in the transcript of the CDI in any event.

Findings of Fact

10. The Claimant commenced employment as a train operator on the Bakerloo line on 12 June 1995. He is an active member of the RMT, a trade union recognised by the Respondent. Since April 2008 he held the position of RMT Tier 1 Health and Safety Representative on the Bakerloo line and was acknowledged by the Respondent as a representative of workers on matters of health and safety. As part of his duties he was entitled to be released from his normal duties for a number of different matters. His release time included full day releases for preparation and attendance at Tier 1 meetings, full inspections every 3 months and 1 day every 4 weeks for any general matters he wished. This was part of a wider facility agreement with the unions by which there were also two permanent full-time trade union representatives on the Bakerloo line.

11. Prior to the incident for which he was dismissed, the Claimant was not subject of any adverse disciplinary finding, and had a good safety record.

12. The Claimant was an active health and safety representative on the Bakerloo line. He was a campaigner. He was an active blogger on health and safety matters. His posts and his representations generally were very forceful to the point of being aggressive. On occasion they could be bombastic. This is within a culture of confrontational communication between management and unions and a competitive environment between the unions as well which only encouraged an argumentative atmosphere as between management and the unions.

13. The Claimant's union work was inextricably linked with his health and safety work and they were perceived as such as well by management.

14. The Claimant had developed a reputation as being a "pain" as far as management of the Bakerloo line was concerned. The management did recognize that, to a certain extent, this formed a part of his job as a health and safety representative. However, they perceived him as being unhelpful/not constructive.

15. While there was a stated ambition to have a collaborative health and safety culture at London Underground there were situations in which discussions about health and safety became the occasion for confrontations between management and the unions reflecting the volatile nature of the relationship overall.

16. An additional background factor in this matter was the relationship between the Claimant and his line manager, Ismael Rionda Rodriguez. The Claimant first met Mr Rionda-Rodriguez in December 2007 when Mr Rionda-Rodriguez was a new manager. There was an incident in which Ismael Rionda Rodriguez interrupted the Claimant's lunch break to pass on a work message. The factual circumstances of this incident are trivial but from this developed an antagonistic relationship which was, largely based on a conflict of personalities.

17. In around November 2009 Mr Rionda-Rodriguez was seconded to Elephant and Castle as the TOM of the Bakerloo line. It is likely that his predecessor had developed a relatively relaxed working style with the unions. Mr Rionda-Rodriguez was new. His philosophy was one where he wanted to address problems analytically and would not necessarily just grant all union requests for more time. Additionally he brought with him what he considered to be a more rigorous culture which he had acquired at Queen's Park.

18. He was very focused on the need for effective use of time and resources. His written style could be formal, considered and polite however he was a determined individual and fairly robust. As a relatively new manager, he would, not unreasonably, frequently seek guidance on problems he faced in the workplace - including those concerning labour relations. Some of the problems he sought guidance about concerned the Claimant. One of the consequences of this was that the Claimant and his activities became well known to management.

19. On 15 April 2010 a new seat was introduced on a trial basis on Unit 3299. This occurred after there had been prior consultations with the unions. On 30 April 2009 an incident took place which concerned the trial train operator's seat in 3299 in that Dave Simms stated that the test seat slid forward while he was driving and he hit his knee against the console of the cab and took a day off as a result [377B].

20. The seat was inspected at the time by a technician and he was unable to find a fault with it. An incident report form was completed and management and the Health and Safety representatives were informed by email on 30th April. It was confirmed in response to a query from the ASLEF safety representative, Mr Wyatt that the Train Operator was not seriously injured and had taken annual leave the following day.

21. Some 6 days after the incident, the Claimant made the claim that 5 T/Ops (train operators) had been injured by the seat and suggested it was unsafe. Mr Rionda-Rodriguez informed the Claimant that the only problems that had been found had centred on the correct way to adjust the seat and he had caused a one page manual to be created and put in the cab. The Claimant was not satisfied with this and stated that the seat should be taken out of service. On 12 May 2010 he refused to drive the train with the unit himself on the grounds of Health and safety.

22. The Claimant also gave evidence that a number of his members had made complaints about the new seat and its tendency to move forwards when the train left Queens Park. However, the Respondents were left with a situation where it was unclear who the staff were concerned.

23. On 13 May 2010, Jason Wyatt and the Claimant emailed to request an ad hoc safety meeting to discuss the seat as well as time off to carry out an inspection of the seat [381]. On the 16th May 2010 Mr Riando-Rodriguez refused the Claimant's request on the basis that he had carried out his own investigation. He apologising for the delay in responding to the Claimant's request. He informed Claimant that he had been actively involved in collating evidence and liaising with different departments. He set out in detail the findings of his investigation which included the fact that there had only been one incident with the seat recorded and no fault had been found. He invited Claimant to produce any evidence of the numerous complaints that had been alleged. The Claimant did not, at this time, or any other time, identify those who had been supposedly injured by the seat. Mr Rionda-Rodriguez also referred to the fact that he considered the Claimant's refusal to drive the train as unjustified.

24. The email in question was copied to those individuals who the Claimant had been copying into earlier email correspondence on the matter. (389). The Claimant found the reply and the fact that it had been copied to others offensive and subsequently brought a grievance against Mr Riando-Rodriguez based in part on the contents in his email of the 16th May 2010 (Grievance 400 - 401). On 5 June 2010, the Claimant formally requested that the matter be dealt with as a bullying complaint. He subsequently expanded this complaint on the 24th June 2010 and it was decided to deal with it formally through the bullying and harassment procedure.

25. The Claimant booked a day as annual leave on 19th May in order to undertake an investigation. His evidence was that the main thing he wished to undertake was an inspection of the unit. However he also stated that he did not have the technical expertise to undertake such an inspection and confirmed that on the 19th he did not in fact inspect the unit but rather reviewed the Incident Reporting Form (IRF) and spoke to DMTs and colleagues. He, of course, had an opportunity to inspect the seat on 12 May but refused to work.

26. Upon learning of the offence caused by his email, Mr Rionda-Rodriguez asked to see the Claimant with a view to resolving the matter informally which was in accordance with the

Grievance Policy. The Respondent felt that Mr Rionda-Rodriguez had behaved in an aggressive fashion. Mr Rionda-Rodriguez perceived the Claimant as being the one who was being unreasonable.

27. Following the unsuccessful meeting between Ismael Rionda Rodriguez and the Claimant to clear the air, the Claimant sought to lodge his complaint as a Bullying and Harassment complaint and, as a result, an accredited manager Ms Sandey was appointed on or about 15 June (419, 423). She considered, in the first instance, that it may be suitable for informal resolution under the procedure. She met with the Claimant who put forward further complaints dating back to his first meeting with Mr Rionda-Rodriguez in 2007 [436 - 437].

28. She decided that *Route C* (439) (i.e. the formal route) within the Respondent's Harassment and Bullying at Work Procedures was appropriate and passed the matter to Warren McVeigh to arrange for external investigation. As a result of these further complaints an external investigator ("the investigator") was appointed on 30 June [443]. At this time it was also decided that Mr Rionda-Rodriguez should not manage the Claimant and he was advised of this by Mr McVeigh the PMA (448A). Mr Rionda-Rodriguez adopted an overtly literal approach to this instruction and decided not to email the Claimant the minutes of the previous Tier 1 Quarterly meeting. The minutes were produced by Mr Whyatt but distributed by Ismael Rionda Rodriguez.

29. There was a discussion about whether Ismael Rionda Rodriguez should chair the meeting - he was not keen - but management decided he should chair the meeting nevertheless. The Claimant confirmed that he was content for Mr Rionda-Rodriguez to attend the meeting. The Tier 1 Quarterly Safety Committee Meeting took place on 15 July 2010. The meeting quickly deteriorated. The Claimant has subsequently exaggerated the conduct of Ismael Rionda Rodriguez at the meeting. However, Ismael Rionda Rodriguez lost his cool and seemed keen on asserting his authority by telling the Claimant to be quiet when he interrupted him as he sought to make a personal statement to the meeting. Both of them appeared to lose sight of what the meeting was about.

30. Mr Lynch had, in fact, been informed on 9 July that his bullying investigation was to be allocated to an external company called CMP, after which the matter would be referred to the Accredited Manager, Liz Sandey to decide on whether bullying had occurred or not (455).

31. Following the 15th July meeting, Ms Sandey reviewed the working arrangement regarding Mr Rionda-Rodriguez and the Claimant and proposed suspending Mr Rionda-Rodriguez or moving him elsewhere. Mr R Smith disagreed with this approach on the basis of the allegations and the fact he considered it would be easy to keep the parties apart. There then followed a debate as to the correct interpretation of the Respondent's policy. The result of this was that Ms Sandey resigned from the position of Accredited Manager on 22 July 2010 [503] and Mr Mike Smith was appointed. Mr Smith reviewed the case and formed the conclusion that it was not necessary to suspend Mr Rionda-Rodriguez. Management of the Claimant was transferred to Mr Curtis at Queen's Park and it was decided that Mr Rionda-Rodriguez must have no management responsibility for the Claimant [507]. He was, however, instructed not to have any day to day managerial involvement with the Claimant [480A].

32. Throughout this period, the investigation of the Claimant's grievance was ongoing and on 23rd July he was interviewed. During his interview on 23rd July he stated, without any

qualification, that he did not believe his perceived treatment by Mr Rionda-Rodriguez was based on the fact he was a Trade Union Representative (1023 para 21). When cross examined it was apparent that he put his differences with Mr Rionda-Rodriguez as being something personal.

33. Despite this he submitted an originating application on 26 July 2010 stating that he has been denied the right to carry out an investigation under the terms of the Safety Representatives and Safety Committee Regulations 1977 by the Train Service Manager but rather he had to undertake this in his own time on 19 May 2010 (this wasn't strictly true), he had been excluded on health & safety issues and victimised pursuant to the Safety Representatives and Safety Committee Regulations 1977, Employment Rights Act 1996 s 44 detriment (b) & (ba) and the Trade Union Labour Relations (Consolidation) Act 1992 s 146.

Incident on 9th August 2010

34. Pursuant to the Railway Safety Regulations 1999 (Bp223a) the Respondents are required to have a train protection system installed. The Respondent meets this requirement by the installation of a device called a 'tripcock'. This is a device which will cause the train to automatically break should a train driver accidentally pass a signal at danger. This is considered to be an essential safety device and is tested daily to ensure it is in proper working order.

35. If a tripcock is found to be in anyway defective e.g. it cannot be reset after being triggered on passing a signal at danger or it fails a tripcock test then the Train Operator must adopt a particular safety procedure. It was agreed by the Claimant that this is an important and well known rule by T/Ops. In the event that a tripcock is defective the driver must take his train out of service, must detrain any passengers and proceed at a caution speed. Further a driver is not permitted to continue (even with the train out of service) unless there is a second person in the cab. This person is to act as an additional look out in case the driver passes a signal at danger. To proceed without such precautions places both the driver at personal risk but also customers who might be on another train. The particular risks include hitting a stationary train or another train at a Junction.

36. At the material time the Claimant was well aware of the relevant rule. The 'Defective in Service Manual (p569) expressly stated that a second person was required. The Claimant had previously had an occasion where he had had a tripcock fail and had used a second person. He had received training and in regular refresher training assessment had demonstrated his knowledge by correctly identifying a failed tripcock as an occasion when a second person was required. Further in his capacity as H&S representative he had posted articles on a blog which included one entitled *'Tripcock Test Farce on the Bakerloo Line'* in which he stated that *'Week 1 Day 1 we are told that safety is paramount'* he then went on to state *'Light stays on. Train Fails. Train out of Service, with a second person in cab. Enshrined in the rule book (...) when we fail to carry out correct procedures, we get sacked."*

37. On the 9th August 2010, the Claimant was involved in an incident whilst in charge of his train and making his way out of Wembley Central - a portion of the line under the control of Network Rail. The Claimant was alerted to a signal failure [526] and was authorised to pass a red light by the Wembley Mainline Suburban Signaller ("the Signaller"). As a consequence of carrying out this procedure the tripcock, (the device that automatically stops the train when it passes through a red light) was set off. The Claimant attempted to reset the tripcock without success.

38. The Claimant informed the Signaller about his difficulty and asked for a train maintainer to be made available at Queen's Park. Whilst at Stonebridge Park, the Claimant told the Controller that he would have to go out of service and asked whether he should go back into the depot or carry on southbound. The Signaller told him to carry on southbound to Queen's Park as there was a queue of trains behind him. The Claimant detrained at Stonebridge park and whilst this was happening contacted Bakerloo Control ("Control") to inform them what had happened and ask whether he should go back to depot or carry on southbound. The Line Controller told him he would be met at Queen's Park and said 'thanks for the information' and hung up (528). The Claimant drove south in his empty train at caution speed.

39. Neither the Claimant nor the Signaller and/or Control mentioned the necessity of a second member of staff in the cab before he pulled out of the station. As the Claimant was leaving Stonebridge Park however, he stated that he realised he had made an error. In any event Bakerloo control mentioned an additional member of staff to him some minutes after he had left Stonebridge Park.

40. The course of action he had set out upon meant he proceeded through three more stations. Nobody told him to stop his train at one of the intervening stations. He was however, told to pick up a train maintainer at Kensal Green [530]. He was told that it had not been possible to source a second member of staff for him as he had left Stonebridge Park [530]. The Claimant was subsequently told that he was to be relieved at Queen's Park.

41. After he had left the train he gave a statement in which he admitted that he should have had a second person in the cab as he left Stonebridge Park [536]. He was also interviewed by George Thompson [537]. Under the Respondent's procedure, the manager who carries out the investigation is responsible for reviewing the evidence and determining what should happen.

42. In that interview [537] he again admitted that he was aware that he should have had a second person in the cab [539]. He said that after his train had departed, Control had contacted him again and asked if he had a second person on board. He informed them he had not. He said he was proceeding at caution speed. Additionally, Control had contacted the Claimant a further time. He had asked if they had sourced a second member of staff and was told no and that he should remain at reduced speed until Kensal Green as none of the other stations had anyone available. He was not told he should not move the train further without a second member of staff. At Kensal Green he had been met by a Train Maintainer and "he cut the trip back in."As a consequence of this the train was put back in service and he proceeded to Queen's Park where he was relieved. At the conclusion of his interview he added that he had lost confidence in questioning manager's decisions since his dispute with his line manager (referred to as the "confidential matter").

43. The significance of his account in interview was that he conceded that the train was being operated contrary to policy from Stonebridge Park via Harlesden, Willesden Junction until it reached Kensal Green.

44. The Claimant was suspended from train operator duties.

45. In accordance with the Respondent's procedures the Claimant was interviewed at a fact finding. The manager, Mr Thompson informed the Claimant that Mr Rionda-Rodriguez had asked to be kept in the loop. The Claimant alleges that Mr Rionda-Rodriguez was controlling

the investigation. Mr Rionda-Rodriguez confirms that Mr Thompson came to see him and seemed to be seeking reassurance. He was said to be nervous and shaking. The reason for this was an appreciation from the point of view of Mr Thompson of the significance that Health and Safety and Trade Union Representative of the claimant's standing had been caught in an incriminatory position.

46. Mr Rionda-Rodriguez states that he informed him to conduct a thorough investigation and to keep him posted or in the loop. Mr Rionda-Rodriguez says that this was because the Claimant was stood down from driving duty and he wished to know for the purposes of managing his train operation resources. Mr Rionda-Rodriguez was quite open about Mr Thompson coming to see him.

47. At this time, the Claimant was not being managed by Mr Riando-Rodriguez because of his grievance and his actions came close to if not actually contradicted the instruction given to him on 19 July 2010. Contrary to the normal procedure, Mr Thompson told the Claimant the decision as to what should happen was not his but would be run past Mr Rionda Rodriguez. The Claimant protested and the investigation was transferred to Mr Gerry Lyon, Duty Manager from Queen's Park Depot.

48. A Fact Finding interview was conducted by Mr Lyon on 19 August [546]. Again, the Claimant stated he realised he had made an error as soon as he left Stonebridge Park. At the conclusion of the interview Mr Lyon said to the Claimant that he had been very honest throughout the meeting (he stressed that he had not been duplicitous in any way [550]) but that technically he could not make a decision about what should happen as it was the responsibility of PM [i.e. Performance Manager]. This does not accord with the Respondent's policy.

49. On 27 August an email was received from Peter Coath, Service Controller on the Bakerloo line who confirmed that the Claimant had rung him from Stonebridge Park on 9 August to say he had been unable to reset his trip cock. It went on to say that the service deck had contacted station staff to try and find a suitable person to act as second man in the cab but that the train departed from the station in any event (and without such a second person). The relevant member of the service control staff did not, in fact, write an email setting out his side of the matter until 31 August. When the transcript of the conversation was eventually disclosed it revealed that Bakerloo control had made not the slightest criticism of the Claimant at the time but rather just told him that they would get a Train Maintainer to meet the Claimant at Queen's Park. The email evidence of the control staff should have been treated with more scepticism as it sought to exculpate them from blame.

50. On the same day, Simon Curtis wrote to the Claimant to inform him that he was to be the subject of a Company Disciplinary Interview (CDI). the potential significance of that was that a CDI could decide to dismiss the Claimant although this was not stated in the letter. This was surprising as it was Mr Lyon who had investigated the matter and who subsequently prepared a report (dated 27 September 2009) which charged the Claimant with gross misconduct.

51. Mr Smith who is Performance Manager candidly accepted that he had been approached by Mr Curtis regarding whether the matter should be referred to a CDI and that, based on the information presented, it did appear appropriate (it is not clear that this is obvious in the light of the treatment of the comparator, Sarah Barlow). There is no express rule in the Respondent's disciplinary procedure forbidding managers from consulting other managers in

the course of a disciplinary investigation so long as they appreciate that would disqualify them from playing a part in subsequent disciplinary proceedings. However, both the disciplinary policy and the LUL Discipline Support Pack envisaged the decision as to referral to a CDI be taken by the investigator. It is not apparent that this took place here. In the absence of evidence from Mr Thompson and Mr Curtis we are left with a profoundly unsatisfactory situation in which we only have a very partial picture of how the decision was arrived at to deal with this matter as a CDI as opposed to a local matter or as a matter of competence. The likelihood is that there were widespread discussions about this case amongst LUL managers many of whom worked in close proximity with each other. It is inevitable that some of these discussions would have included the significance of the Claimant's status as a Trade Union and Safety Committee representative and his reputation. As Robert Smith conceded, this was because of the "profile and sensitivity of the case" arising as it did out of the Claimant's protected status.

52. The allegations the Claimant faced were of gross misconduct on 9 August while in charge of a train, the Claimant had
    (1) left Wembley Central with the leading trip-cock cut out without being given instruction to do so by the suburban signaller
    (2) left Stonebridge Park Station without requesting or obtaining a second member of staff in the cab contrary to the Defective In Service Instruction

    and code of conduct section 3.1.1 f 27 October 2003

    Additionally it was said that these were contrary to the Code of Conduct.

53. In the meantime a response had been filed by London Underground to the Claimant's first claim on 23 August 2011 which was listed for a hearing on 19 November 2010.

54. Additionally the Union had been anxiously corresponding with London Underground as they were concerned that they still had not received transcripts of the conversations between the Claimant and the control room where he had contacted them by hand held radio [562].

<u>Company Disciplinary Interview</u>

55. The CDI took place on the 12th October 2010 before two managers, Ms Alana Stewart and Mr Simon Jones who made up a joint panel. The Respondent's have sought to argue that the decision is solely that of the Chair and that while the second chair attends the hearing and deliberates with her it is not a joint decision. The Tribunal do not accept this and this does not appear to be consistent with the LU Discipline Procedure nor the LU Discipline Support Pack.

56. There was a discussion about the role of the PMA at the beginning of the disciplinary hearing which would have been a perfect opportunity to inform the parties if it had been the case that the decision was to be solely that of Ms Stewart. However, Ms Stewart just referred to "our decision [620]" confirming that it was a joint decision. Additionally while introducing the business of the day she concluded by stating that the panel would have an adjournment for a couple of hours while, "we make a decision." At the end of the hearing day she emphasised "it's important we reach the right decision" [798] and later she emphasised that time was required for both members of the panel to review everything [799].

57. It is also very striking that in neither the appeal nor in the Director's Review is it asserted that the decision to dismiss was made by Ms Stewart alone. This is obviously not the most

important matter that needs to be decided by the Tribunal but it obviously diminishes the credibility of Ms Stewart as a witness who was so adamant that the decision was hers alone. The reason for this was that she was seeking to dissociate herself from the recorded utterances of her second chair, Mr Jones.

58. At the hearing before the panel, the Claimant was represented by Mr Whitehead. An official note taker attended the hearing and there is a verbatim transcript running to some 100 pages. At the hearing Brian Whitehead, set out his stall at the outset arguing that the Claimant's conduct was not wilful and therefore could not be counted as gross misconduct and also that he believed that he had been charged in the way he was because he was a union representative. Additionally, he raised a comparator case concerning another train operator who was not an RMT representative who for a worse offence was given a 52 week warning. The Respondent's procedure specifically provides that managers hearing CDIs should consider comparator cases. Mr Whitehead contended this case was more serious than that of the Claimant as the train had travelled for 5 to 6 stations at full speed in full passenger service. Despite this, that case was referred to the less serious Local Disciplinary Interview procedure. The Union also asked what action has been taken against the Bakerloo line controllers in this case.

59. Mrs Stewart told us she made enquiries about comparable cases but there is no contemporaneous evidence that she did so and she makes no reference to it in her extensive witness statement. We do not accept her evidence on that point on that basis.

60. The Tribunal accepts that enquiries have now been made which show that there are no other examples of cases of this sort being dealt with at CDI level. LUL do not keep central records of the outcomes of local procedures.

61. What is striking is that Mr Jones made reference to the claimant's role as an RMT health and safety representative at the hearing on 4 occasions [698, 751, 767, & 769]. In essence it was put to him that he should know better. Three of the references are after the panel have retired for lunch. M Stewart conceded in evidence that Mr Jones dominated the discussions. We conclude that if Ms Stewart did not know of the Claimant's status and reputation at the outset of the hearing, she did so by the conclusion of lunchtime of the day of the hearing.

62. The CDI was not concluded on the 12th October 2010 but, instead, reconvened the following day. The decision of the panel was signed by both members [807]. The panel dismissed the first allegation in that the instruction to the Claimant to pass the signal was an implied instruction to leave the station. The Tribunal is of the view that the first charge was not supported by the evidence and it is surprising that it formed a charge against the Claimant from the outset. Additionally the third charge just consisted of a reference to a catch all provision and added nothing to the proceedings. However, the panel found the charge relating to leaving Stonebridge Park without a second person was proven. The panel specifically stated in relation to the Claimant's contention he had lost confidence to challenge an incorrect management instruction that,

> "The panel finds this second point particularly concerning given your role as a Health and Safety representative."

63. The panel added that they acknowledge that there have also been failings on the part of the Bakerloo Service Control and Wembley Suburban Signaller but that these have been addressed in a Corrective Action Plan. In fact there was no evidence for this but they did say there should be a further investigation into their actions. This did not happen and it

subsequently transpired that no Corrective Action Plan had been put in place [834]. On that basis the Tribunal does not accept that the panel made any reasonable enquiries as to what action had been taken against the other Bakerloo line employees.

64. The panel imposed the sanction of summary dismissal. Our finding is that this was a panel decision and not that of Mrs Stewart alone.

65. The Panel felt that comparator [807] was not helpful as this was a "unique case" because of the involvement of Network Rail. They failed to appreciate that this point made the case of the Claimant less serious than the comparator. They hinted that the comparator case had been dealt with too leniently. They acknowledged that they were still missing some recordings of relevant communications between the Claimant and Controllers but did not believe they would make any difference to the outcome. The Panel did not explore what might be a comparable situation e.g. would an aggravated SPAD be comparable or not? Would opening the doors on the non-platform side of the train while the train contained passengers be a comparable case? Neither the Claimant's contract of employment nor LUL Discipline Procedure provides assistance in this regard. The LU Discipline Support Pack makes reference to gross misconduct but does not seek to give examples. It makes reference to a "Discipline Standard." Neither the original panel nor the appeal made reference to that and it was not provided to us. Only in oral evidence before us was there any reference to gross negligence. There is no contemporary use of that phrase and it doesn't appear in the policy documents produced to us.

66. The decision appeared to acknowledge that the Claimant had made relevant admissions [807]. In fact the Claimant had effectively admitted the second charge and in her oral evidence Ms Stewart conceded that he had admitted it, yet the panel did not record this in their reasons and failed to explore its significance during the hearing. It follows that they had not explored to what extent the Claimant should be given credit for such a plea.

67. There was no reference to any findings of dishonesty. This would, in any event, have been inconsistent with the findings of the investigation. Nevertheless, Ms Stewart in her oral evidence implied that she did not accept the Claimant's account of events but this is not reflected in her contemporary decision making. This is an example of this witnesses dissembling and a further reason why the Tribunal considered her to be an unsatisfactory witness.

68. Formal notice of dismissal was drawn up on 13 October 2010 which represented the effective date of termination. It is rather unfortunate that this formal document did not reflect the decision of the panel to acquit the Claimant of two of the three charges [809]. This did not prevent Ms Stewart signing the document.

Appeal

69. The Claimant appealed against this decision and his appeal was heard on the 25th October 2010. Written submissions were filed by his union relying on the Respondent's Manager's Handbook in support of their contention that the Claimant's actions should have been treated as performance -related particularly as there was no evidence that they were wilful or intentional. Additionally, the Respondents had not treated the Claimant in a like manner to other incidents with particular reference to the comparator case on the Piccadilly line but also with regard to the fact that this incident was less serious than an aggravated SPAD (i.e. one where there was an element of a cover-up afterwards) or the opening of doors on the wrong side. What is striking about those matters is that they are the subject of a consensus that they would be prima facie grounds for summary dismissal and they would be known as

such by employers and employees. There is not the same consensus about failing to secure the services of a second person in the cab in the circumstances of this case.

70. As part of the appeal, there was an unequivocal assertion that the Claimant had been treated more harshly and dismissed because he was a health and safety representative in that knowledge had been imputed to him unlawfully. It also highlighted the problem that some of the transcripts of relevant conversations were missing.

71. The Appeal was presided over by Chris Taggart on 25 October 2010. At the outset he stressed it was not to proceed by way of a re-hearing. He had the benefit of a report by Mark Cullen into the involvement of service control in the incident on 9 August 2009. This concluded that none of the controllers had acted outside their remit and that no disciplinary action would be taken against them [831].

72. The Claimant was informed on the 3rd December 2010 that his appeal had been unsuccessful.

73. Following the appeal hearing, Mr Taggart had taken time to consider his decision and by letter he wrote giving comprehensive reasons why he rejected the appeal. As concerns the Network Controller, he believed that they would not be expected to know of the appropriate systems that would operate on LUL but that he did have concerns about the involvement of the Bakerloo Line Service Controller who he believes, once they had established that there was a serious incident should have insisted that the train was stopped and that they should be provided with coaching (it is understood that this has not happened).

74. He expressly considered the suggestion that an unfair onus had been placed on the Claimant as a Union Representative and concluded this had arisen as a result of a misunderstanding by one of the panel (Mr Jones) about the nature of the Claimant's defence to the charge (which he considers was not unreasonable). He concludes that Mr Jones had believed that the Claimant was claiming he was not aware of the procedure however this was clarified by the Claimant. On that basis the Panel had not imposed a higher standard on the Claimant because of his status as a health and safety representative.

75. Unfortunately for Mr Taggart that cannot explain the fact that the four references by Mr Jones to the Claimant's status are so evenly spread out during the hearing [698, 751, 767, & 769] nor, as he conceded in oral evidence, that they came "out of the blue." It also ignores the clear references to the Claimant's status in the reasons the panel have for their decision. It is noteworthy that he does not seek to argue that the opinion of Mr Jones can be disregarded as he didn't form part of the panel.

76. He does not deal with the question raised by the union as to whether the problem that had arisen here was one of competence or gross misconduct and whether the Respondents were acting punitively rather than correctively contrary to their own policy and practise and the ACAS Code.

77. Mr Taggart also considers the comparator incident and concludes that they are of equivalent gravity (it is likely that it was, in fact, more serious) but that the comparator case was dealt with unusually leniently. He concludes that the Claimant acted as he did despite knowing of the health and safety rule and that he could not be confident that he would not act in the same way if the same circumstances were to arise again.

78. The Tribunal felt that Mr Taggart was an impressive witness who showed a profound understanding of the issues that this appeal raised. It is therefore very striking that despite effectively appreciating that the original hearing was tainted by a preoccupation with the Claimant's status as a health and safety representative he did not address this problem head on but sought to reason that it was a misunderstanding. He was also more concerned with explaining more Mr Jones's comments were not relevant rather than determining whether it had a material effect on the outcome i.e. he was principally interested in exculpation rather than investigation. Further he did not properly appreciate that one of the reasons why the comparator was important is that it disclosed that there was a body of opinion in LUL that did not believe that such incidents constituted gross misconduct. This was consistent with the evidence of Mr Munro, which we accept, that the Line Standards Manager, Mr Steve Senior, believes that the Claimant's case should have been dealt with at a local level.

Grievance

79. In the meantime, the Claimant's bullying grievance continued to be dealt with. It was the subject of a report by CMP on 9 November 2010 [840]. This was a very thorough document produced after examining all the relevant documents and questioning relevant witnesses. It concluded that the complaint of bullying should not be upheld. It concluded that the origin of the problem lay in the fact that Mr Rionda-Rodriguez adopted a different approach to the Claimant's previous managers borne out of his experiences at Queen's Park Depot, his inexperience and the fact that his individual style was just different from that which the Claimant was used to (in particular, he was not afraid to challenge staff members or discuss sensitive issues with them).

80. They were of the view that his correspondence and public conversations with the Claimant were without malice or intention to create offence. However, they did consider that some of his actions at the Tier 1 meeting were ill-judged. This analysis is shared by the Tribunal with the addition that the Tribunal also concluded that there was a clash of personalities between the individuals.

81. Following Mr Taggart's rejection of the appeal, the General Secretary of the Claimant's Union, Bob Crow requested a Directors Review of the decision to dismiss the Claimant. A Directors review is a discretionary matter but it was agreed in this case. Doubtless that was assisted by the fact that Mr Crow set out very clearly and succinctly what the grounds were in his letters of 10th and 15th December 2010. The review was undertaken by Mr McInulty who by letter of 13th January 2011 rejected the Claimant's arguments.

The Law

82. The relevant provisions of the Safety Representatives and Safety Committee Regulations 1977 (SRSC77) provide that:

4 **Functions of safety representatives**

(1) In addition to his function under section 2(4) of the 1974 Act to represent the employees in consultations with the employer under section 2(6) of the 1974 Act (which requires every employer to consult safety representatives with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the health and safety at work of the employees and in checking the effectiveness of such measures), each safety

representative shall have the following functions—

(a) to investigate potential hazards and dangerous occurrences at the workplace (whether or not they are drawn to his attention by the employees he represents) and to examine the causes of accidents at the workplace;

(b) to investigate complaints by any employee he represents relating to that employee's health, safety or welfare at work;

(c) to make representations to the employer on matters arising out of sub-paragraphs (a) and (b) above;

(d) to make representations to the employer on general matters affecting the health, safety or welfare at work of the employees at the workplace;

(e) to carry out inspections in accordance with Regulations 5, 6 and 7 below;

(f) to represent the employees he was appointed to represent in consultations at the workplace with inspectors of the Health and Safety Executive and of any other enforcing authority;

(g) to receive information from inspectors in accordance with section 28(2) of the 1974 Act; and

(h) to attend meetings of safety committees where he attends in his capacity as a safety representative in connection with any of the above functions;

but, *without prejudice to sections 7 and 8 of the 1974 Act*, no function given to a safety representative by this paragraph shall be construed as imposing any duty on him [our emphasis].

(2) An employer shall permit a safety representative to take such time off with pay during the employee's working hours as shall be necessary for the purposes of—

(a) performing his functions under section 2(4) of the 1974 Act and paragraph (1)(a) to (h) above;

(b) undergoing such training in aspects of those functions as may be reasonable in all the circumstances having regard to any relevant provisions of a code of practice relating to time off for training approved for the time being by [the Health and Safety Executive] under section 16 of the 1974 Act.

In this paragraph 'with pay' means with pay in accordance with [Schedule 2] to these Regulations.

5 Inspections of the workplace

(1) Safety representatives shall be entitled to inspect the workplace or a part of it if they have given the employer or his representative reasonable notice in writing of their

intention to do so and have not inspected it, or that part of it, as the case may be, in the previous three months; and may carry out more frequent inspections by agreement with the employer.

(2) Where there has been a substantial change in the conditions of work (whether because of the introduction of new machinery or otherwise) or new information has been published by ... the Health and Safety Executive relevant to the hazards of the workplace since the last inspection under this Regulation, the safety representative after consultation with the employer shall be entitled to carry out a further inspection of the part of the workplace concerned notwithstanding that three months have not elapsed since the last inspection.

(3) The employer shall provide such facilities and assistance as the safety representative may reasonably require (including facilities for independent investigation by them and private discussion with the employees) for the purpose of carrying out an inspection under this Regulation, but nothing in this paragraph shall preclude the employer or his representative from being present in the workplace during the inspection.

(4) An inspection carried out under section 123 of the Mines and Quarries Act 1954 [or regulation 40 of the Quarries Regulations 1999] shall count as an inspection under this Regulation.

6 Inspections following notifiable accidents, occurrences and diseases

(1) Where there has been a notifiable accident or dangerous occurrence in a workplace or a notifiable disease has been contracted there and--

(a) it is safe for an inspection to be carried out; and
(b) the interests of employees in the group or groups which safety representatives are appointed to represent might be involved,

those safety representatives may carry out an inspection of the part of the workplace concerned and so far as is necessary for the purpose of determining the cause they may inspect any other part of the workplace; where it is reasonably practicable to do so they shall notify the employer or his representative of their intention to carry out the inspection.

(2) The employer shall provide such facilities and assistance as the safety representative may reasonably require (including facilities for independent investigation by them and private discussion with the employees) for the purpose of carrying out an inspection under this Regulation; but nothing in this paragraph shall preclude the employer or his representative from being present in the workplace during the inspection.
(3) In this Regulation 'notifiable accident or dangerous occurrence' and 'notifiable disease' means any accident, dangerous occurrence or disease, as the case may be, notice of which is required to be given by virtue of any of the relevant statutory provisions within the meaning of section 53(1) of the 1974 Act.

83. Section 152(1) (b) and s152 (2) Trade Union and Labour Relations (Consolidation) Act 1992 provides:

152 Dismissal of employee on grounds related to union membership or activities

(1) For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee--

(*b*) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, ...

(2) In subsection [(1)] 'an appropriate time' means--

(*a*) a time outside the employee's working hours, or
(*b*) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union [or (as the case may be) make use of trade union services];

and for this purpose 'working hours', in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

84. Section 100 Employment Rights Act 1996 provides:

100 Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that--

(*a*) ...
(*b*) being a representative of workers on matters of health and safety at work or member of a safety committee--
(i) in accordance with arrangements established under or by virtue of any enactment, or
(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

85. Section 98 Employment Rights Act 1996 provides:

Section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

> (*a*) the reason (or, if more than one, the principal reason) for the dismissal, and
> (*b*) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

> (*a*) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (*b*) relates to the conduct of the employee,
> ....

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

> (*a*) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (*b*) shall be determined in accordance with equity and the substantial merits of the case.

(6) Subsection (4) is] subject to--

> (*a*) sections [98A] to 107 of this Act, and
> (*b*) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

86. The burden is on the Claimant to show that the dismissal was on grounds that the Claimant
had taken part in the activities of an independent trade union at an appropriate time or being a representative of members on health and safety or a member of a safety committee. However, pursuant to the findings of the EAT in *Neckles v London United Busways* [2000] UKEAT 1399 if primary facts or inferences from primary facts led the

Employment Tribunal to conclude that there were matters that required further explanation, then it was the responsibility of the Respondent employer to put forward such. This was decided by analogy with the principles set out in *King v GB China Centre* [1991] IRLR 513 CA. The burden of proof does not shift to the employer but the Tribunal had to decide whether the employer's explanation was adequate. If they did not accept the employer's explanation then they should infer that the dismissal was on the prohibited ground.

87. The burden is on the Respondent to show the reason for dismissal for the purposes of unfair dismissal (*Abernethy v Mott, Hay and Anderson (1974) ICR 323* (as approved by the HL in *W. Devis & Sons Ltd v Atkins (1977) AC 931*),

> "A reason for the dismissal on an employee is a set of facts known to the employer, or it may be beliefs held by him, which caused him to dismiss the employee."

88. The significance of this is that the primary site of our factual enquiry should be centred on what the employer knew.

89. If the Employment Tribunal accepts the reason for dismissal was conduct, the Employment Tribunal must consider whether the dismissal was fair in the all the circumstances. In determining whether the dismissal was fair the Employment Tribunal must consider whether it was within the band of responses that would have been considered by a reasonable employer; see *Iceland Frozen Foods Ltd v Jones (1982) IRLR 439.*

89. If the Employment Tribunal accepts that the dismissal was for conduct it will also be necessary to consider the well known test set out in *British Home Stores v Burchell (1978) IRLR 379*

> "In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is fair, an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in mind reasonable grounds on which to sustain that belief and third, the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable at all the circumstances to the case."

90. The regime was modified by the Employment Act 1980. It is worth noting that this problem was identified as early as *Boys & Girls Welfare v McDonald* [1997] ICR 693 EAT (i.e. that an ET would fall into error by placing the onus of proof on the employer to prove reasonableness).

91. The Employment Tribunal are reminded that throughout, in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether Respondent's actions were within the band of reasonableness; see *Sainsbury's Supermarkets Ltd v Hitt (2003) IRLR 23)*:

"The objective standards of the reasonable employer must be applied to all aspects of the

question as to whether an employee was fairly and reasonably dismissed. Further, the "band of reasonable responses test" applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason."

92. We were referred to and adopted the reasoning of the Court of Appeal in *Paul v East Surrey District Health Authority* [1995] IRLR 305 and cite the following relevant paragraphs,

> 34 I consider that all industrial tribunals would be wise to heed the warning of Waterhouse J, giving the judgment of the Employment Appeal Tribunal in *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 where, in paragraph 25, he said:
>
> 'We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by s.57(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation.'
>
> 35. I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.
>
> 36. An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely. I mention this because I consider that if the industrial tribunal in this case had had regard to these factors they would not have regarded the actions of the employers in Mrs Rice's case as disparate or have said that Mr Verling's misconduct should have been treated just as seriously, if not more seriously, than Mr Paul's.

93. We also had regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures [2009], Paragraphs 4, 22 and 23 in particular.

94. In considering contribution, in accordance with *Nelson v BBC* [1980] ICR 110 CA, the Tribunal had to be satisfied that the conduct of the employee was culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract, it was foolish or perverse or unreasonable in the circumstances, that it had contributed to the dismissal and that it was just and equitable to reduce the award.

Submissions by the Parties

95. We had the benefit of written submissions from both parties.

On behalf of the Claimant

96. The Claimant alleges the reason for his dismissal was his trade union activities as a health and safety rep (Section 152 TULR) and/or his performing his health and safety representative duties (Section 100 ERA).

97. The Claimant' contends that his role as an RMT health and safety representative should have had no bearing on his case. As is pointed out in the ET1, under Reg 4 of the Safety Representatives and Safety Committees Regs 1977, 'no function given to a safety representative by this paragraph shall be construed as imposing any duty on him.' This was not the approach adopted by Mr Jones and adopted by the disciplinary panel in their joint reasoning.

98. In the event the Tribunal do not uphold the Claimant's primary case as to the reason for his dismissal, the Claimant would contend that the dismissal was, in any event, unfair within the meaning of Section 98(4). In particular that the investigation was unreasonably deficient in that the Respondent failed to obtain the transcript of the telephone conversation between the Claimant and Control whilst he was at Stonebridge Park even though it was asked for both before and at the CDI. This was a crucial piece of evidence and provided a different picture to that conveyed in the email from the line controller;

99. Additionally, it is submitted that the Respondent did not have reasonable grounds for believing the Claimant was guilty of misconduct such as to justify his dismissal and that dismissal was a disproportionate sanction for the offence.

100. The Claimant argues that there should be little or no contributory fault especially because the Claimant's conduct was not wilful or blameworthy.

On behalf of the Respondent

Claim under SRSCR 77

101. Regulation 4(2) does not mean that a part-time H&S Representative is entitled to time off whenever he deems it necessary.

102. The Respondent submits that in the first instance having regard to the matter in issue 'the alleged defective seat' it was not necessary for the Respondent to permit any time off for an 'investigation'.

Unfair Dismissal

103. The Respondent submits that the Claimant was clearly dismissed for the potentially fair reason of conduct.

104. A genuine issue of misconduct happened on 9th August 2010. The Claimant himself accepted that his actions on that day warranted disciplinary action and sanction. There was, therefore, a genuine prima facie against him. Additionally there is no background of 'Union discrimination' in this case and, any event Mr Rionda-Rodriguez was not driving the instigation of a CDI .

105. The Respondents had a reasonable suspicion amounting to belief in the guilt of the Claimant and it was based on Reasonable Grounds following as much investigation as reasonable in the circumstances. It is submitted that that the penalty of dismissal was prima facie within the range of reasonable responses open to a reasonable employer in the circumstances.

106. The Respondent submitted that the treatment of Ms Barlow does not render the Claimant's dismissal unfair. The Tribunal's primary focus should be whether it was reasonable to dismiss the Claimant for his misconduct and the Tribunal should avoid adopting a tariff approach to disciplinary sanctions.

107. In any event at both the dismissal and the appeal, the Respondents gave consideration to the comparator relied upon and both Mrs Stewart and Mr Taggart considered that Ms Barlow's case was extremely serious and that the approach of dealing with her at LDI instead of CDI was an incorrect one. At appeal Mr Taggart sought to investigate further and even tried to speak to the manager in question but was unable to do so as he was no longer employed.

108. Even if the Tribunal finds that C was unfairly dismissed it is submitted that there was a significant degree of blameworthy conduct on his part.

Application of the facts to the law

109. The Tribunal found the Claimant to be a reasonably straightforward witness. Indeed it was his account of the origin of the dispute with Ismael Rionda Rodriguez (i.e. that it was personal) which led to various of his claims having to be withdrawn. There was however, a somewhat histrionic tone to some of his correspondence as a union representative. This appears consistent with the culture in which he was placed. It is of concern that his evidence is not consistent with the contents of his first originating application. However, before the Tribunal the Claimant was a truthful witness. The Claimant was also truthful with the Respondents in his dealings with them about the August incident.

110. Ms Alana Stewart was an unsatisfactory witness as we have described above. By contrast Chris Taggart was a thoughtful witness who sought to assist the Tribunal and who applied a sophisticated approach to the problem. An example of the fair minded way he approached the case in contrast to Ms Stewart was the fact that he conceded immediately that the Claimant had been truthful throughout and that the questioning by Mr Jones was

problematic because of the way it appeared to come "out of the blue" and was not particularly prompted by something that had been said by the Claimant or his representatives. However, the problems with the Respondent's case on the question of unfair dismissal come about, at least in part, because of defective analysis at the appeal - conducted as it was as a review and not a re-hearing.

<u>Failure to provide time off</u>

111. It is important to note that the workplace in question already had in place agreements and arrangements for the release of Union Representatives which included affording the Claimant one day every four weeks whereby he was free to attend to any Health and Safety matters he wished (including investigations). Further the Respondent allowed another H&S Representative from the Claimant's Union full time release.

112. The Tribunal was simply not provided with evidence which would allow itself to conclude that it was necessary to permit the Claimant to have additional time off to investigate complaints by an employee/employees as requested on 13 May (and rejected on 16 May).

113. The Tribunal concludes that the Respondent did not fail to permit the Claimant to have time off with pay on 16 May 2010 as was necessary to investigate complaints by any employee he represented relating to that employee's health safety pursuant to <u>Regulations 4 (2) (b) of the Safety Representative and Safety Committee Regulations 1977.</u>

114. In fact there was only one individual who had reported a minor injury and the seat had been inspected immediately after the incident and no fault found. On that basis there was no prima facie need for a Health and Safety Investigation. Additionally, the Respondent had taken steps to ensure that no repeat of the incident occurred by providing a briefing to staff and producing a one page manual for the unit. The Respondent had also made enquiries about whether other faults had been reported and provided that information to the Claimant. It is of concern that despite assertions by the Claimant and Aslef that the driver in question had been injured they failed to provide any information about these alleged injuries despite an express invitation to provide the same. It is redolent of a wilful/irrational refusal to accept that the matter had been dealt with.

115. The Tribunal does not believe that the introduction of the seat on one unit on a trial basis amounted to a substantial change in the conditions of work. Additionally, given the facilities already available to the Claimant and his union and sister union there is no satisfactory evidence to show that it was necessary to grant additional time off for an inspection pursuant to <u>Regulations 4, 5 & 11 of the Safety Representative and Safety Committee Regulations 1977 ("Safety Regs").</u> The fact that the Claimant chose not to make the inspection on 12 or 19 May in any event adds weight to our findings.

116. Further, the Tribunal does not accept that the incident concerning Dave Simms amounted to a notifiable accident. In any event there is no evidence that it was necessary for the Claimant to be granted time off for the purposes of an inspection as a consequence. pursuant to Regulation 6 as a result of this.

The dismissal

117. The Tribunal concludes that the Claimant was dismissed principally because he was a member of a health and safety committee. This was inextricably bound up with his status as a union organiser in the minds of the Respondent in the circumstances of this case and we find that he was also dismissed because of his activities in an independent trade union. In reality the trade union activities that caused him to be dismissed were his health and safety committee responsibilities.

118. The main reason we make this finding is the simplest namely, it is specifically stated to be a reason for dismissal in the reasons given by the panel on 13 October 2010. They posit a higher standard being applied to the Claimant than other workers because of imputed knowledge that he would have about health and safety matters because he is a health and safety committee member. This is despite the explicit wording of Regulation 4 of the Safety Representatives and Safety Committee Regulations 1977 (SRSC77) that provide that *no function given to a safety representative by this paragraph shall be construed as imposing any duty on him.*

119. In addition this matter preyed heavily on the minds of the disciplinary panel as is demonstrated from the fact that Mr Simon Jones mentioned the matter on four separate occasions in the course of the hearing.

120. The Tribunal accept the point made by Brian Munro that the Respondents made a conceptual error. Health and Safety *Representatives* are just that. They are not Trade Union Safety experts. Their role is to represent their members to management not to be a source of particular knowledge. Although there was some appreciation of the error that had been made by the time of the appeal, it was nevertheless dealt with as a review and not as a re-hearing. At the very least, any reasonable employer would have appreciated the necessity for considering the appropriate penalty afresh. This did not happen. As we have already found, Mr Taggart was too anxious to exculpate his colleagues from blame.

121. The Tribunal also accept the submission by the Claimant that Claims of this sort are akin to discrimination claims. An employer is unlikely ever to admit they have dismissed an employee based on their trade union and/or health and safety activities. Overt evidence is unusual. Instead, a claimant will generally need to point to facts and matters from which a tribunal can draw an inference that the dismissal was due to trade union and/or health and safety duties.

122. The Tribunal believes that inferences can be drawn (that the dismissal was on prohibited grounds) from the fact that the decision was unusually harsh bearing in mind:

(i) the Claimant was not subject to any previous adverse disciplinary finding;

(ii) the Claimant proceeded under caution - particularly as to speed. He had also emptied his train of passengers (it is accepted that this did not eliminate risk as there was still the possibility of collision from another train - particularly as it approached Willesden Junction);

(iii) the lack of evidence that any consideration had been given by the Respondent during the investigation as to whether what had taken place was conduct-related and therefore wilful or intentional or performance related when such a matter was required the LU Manager's handbook;

(iv) the finding by the investigator that the Claimant had been frank - this meant that this was not an aggravated incident as widely understood at LUL;

(v) the lack of evidence as to who, how and why it had been decided that this matter should be dealt with at a CDI as opposed to locally

(vi) at all times Claimant was in contact with the Signaller and Control who were aware as to what was going on and, indeed, instructed the Claimant to move and/or continue to move the train (even if principal responsibility rested with the Claimant as controller of his train and the Network controller would not have appreciated what the appropriate LUL procedure would be this was still a mitigating feature); and

(vii) the Claimant admitted his error (attempts by Alana Stewart in her oral evidence to put a new case based on the Claimant's lack of frankness only confirmed that she was not a reliable witness), this should have increased confidence that such an error would not be repeated.

123. This was against a background in which the Respondent's procedure specifies dismissal as a sanction for only the most serious offences. Given the mitigating circumstances above and the absence of an aggravating feature such as covering up his offence or a prior warning, no reasonable employer would have found the threshold was met in this case.

124. The relative harshness of the dismissal is evident from the circumstances of the comparator, Ms Barlow whose offence was more serious than that of the Claimant and yet who was not dismissed. Additionally no disciplinary action was taken against the Bakerloo line Control staff involved in this incident. Even if their conduct was not as serious as that of the Claimant, if this incident was as serious as is claimed by the Respondent then it is not apparent why there was not some form of disciplinary process initiated against the others

125. The Tribunal appreciate the need for flexibility and the importance of dealing with cases on their own merits but consistency is also an integral part of workplace justice. In this case the other cases disclosed there was no workplace consensus about the seriousness of incidents like this or if there was a general understanding it was that in their un-aggravated form, cases such as this could be dealt with at local level. Mr Taggart puts forward powerful arguments as to why he believes that actions such as the Claimant's could be defined as gross negligence and warrant summary dismissal. If that turns out to be agreed, then staff on London Underground should be informed of this variation to the discipline standard as they were by East Surrey District Health Authority in the case of Paul. In this case, however, Mr Taggart was not relying on an established policy but rather positing what he believed could be a standard.

126. Additionally, the Tribunal is concerned about the lack of clarity as to why this case was referred to a CDI when the case of the comparator was dealt with locally. The Tribunal

believes that it is likely that this decision was influenced by the Claimant's status on the health and safety committee and his union role. The Claimant had a high profile amongst the people who made the decision. Even if the Claimant was not a celebrated figure in London Underground he was well known to the mangers in the Bakerloo line. The immediate reaction of Mr Thompson upon hearing of the Claimant's alleged offence speaks volumes in this regard.

127. If, contrary to our principal finding, the Respondent genuinely believed that the Claimant was guilty of misconduct on 9 August 2010 and dismissed him for that reason, the Tribunal is of the view that the procedure was broadly fair insofar as the Claimant was given a good opportunity to put his case and there was a reasonable investigation.

128. However, as concerns the claim of conventional unfair dismissal, the Tribunal find that no reasonable employer would have decided that dismissing the Claimant was proportionate. The reasons for that are to be found at paragraph 122 above. Additionally, the Respondent acted contrary to paragraph 4 of the ACAS Code, the Respondents were not acting consistently.

129. This is not a case where we are concerned with *Polkey* as any deficiencies there were in the decision to dismiss were not really procedural.

130. However, the Tribunal does believe that there should be a reduction in any compensation based on contributory fault on the basis that it is satisfied that the conduct of the Claimant was culpable or blameworthy in the sense that it was foolish and that it had contributed to the dismissal and that it is just and equitable to reduce the award. On 9 August the Claimant breached a well known and significant health and safety rule (the question as to whether it was well known what the consequences of such a breach would be is a separate question and is dealt with above). He admitted as such immediately. There were however mitigating circumstances such as the instructions from Network Rail and Bakerloo line controllers (the latter should have known better). However, culpability rests in the fact that the Claimant, like the captain of a ship or a pilot, was ultimately in charge of his train. The Tribunal adjudges that the Claimant's contribution to his dismissal is 25% in all the circumstances of the case.

Employment Judge M J Downs
Date:

Judgment sent to the parties and entered in the Register on: 4 : MAY: 2011.

JOHN COTTER for Secretary of the Tribunals