Case Number: 3200554/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr B Bobs**

Respondent: **Tube Lines Ltd**

Heard at: **East London Hearing Centre**

On: **18, 19, 20 April and 4 May 2018 (in chambers)**

Before: **Employment Judge Moor**

Members: **Ms J Houzer**
Mr M Wood

Representation

Claimant: Mr K Shoye, representative
Respondent: Mr S Margo, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **the claim for unfair dismissal is well-founded in that the Respondent failed to follow a fair procedure;**

2. **any basic and compensatory awards will be reduced by 100%;**

3. **the direct race discrimination claim is not upheld and is dismissed;**

4. **the victimisation claim relating to race is not upheld and is dismissed.**

REASONS

1. This claim arises out of Mr Bobs' dismissal on 31 January 2017 from his work as a Senior Track Operative with the Respondent.

Issues

2. The issues were clarified and agreed between the parties at a Preliminary Hearing

by EJ Brown as follows.

Unfair dismissal

2.1 *Has the Respondent shown the reason for dismissal and that it was a potentially fair one? The Respondent contends the Claimant was dismissed for misconduct.*

2.2 *If so, did the Respondent act fairly in dismissing the Claimant for that reason in that:*

2.2.1 did the Respondent form a genuine belief that the Claimant was guilty of misconduct?

2.2.2 did the Respondent have reasonable grounds for that belief?

2.2.3 did the Respondent form that belief based on a reasonable investigation, in all the circumstances?

2.3 *Was the dismissal within the band of reasonable responses available to the Respondent?*

2.4 *Did the Respondent follow a fair procedure when dismissing the Claimant? Did it follow the ACAS Code?*

Direct Race Discrimination

2.5 *The Claimant relies on a hypothetical comparator and on his white colleagues as actual comparators: Adrian Cercelaru, Charlie Whiteing and Mr Tyler and Mr Maher.*

2.6 *Did the Respondent treat the Claimant less favourably than it did treat or would have treated a hypothetical comparator, or actual comparators in the same or not materially different circumstances, by dismissing the Claimant?*

2.7 *If so, has the Claimant shown facts from which the Tribunal could conclude that his dismissal was because of race?*

2.8 *If so, has the Respondent shown that race was not part of the reason that it dismissed the Claimant?*

Victimisation

2.9 *Did the Claimant do the following protected acts:*

2.9.1 in 2011 the Claimant alleged to his manager that his supervisor's friend had shouted a racist comment at the Claimant: 'come back

black cunt';

2.9.2 the Claimant submitted a grievance on 13 June 2013 complaining of unequal treatment, race discrimination, harassment and victimisation.

2.10 *Has the Claimant shown facts from which the Tribunal could conclude that his dismissal was an act of victimisation?*

2.11 *If so, has the Respondent shown that the Claimant's protected act or acts were not part of the reason for dismissal?*

Wrongful dismissal

2.12 *Did the Claimant's conduct amount to a repudiatory breach of contract, justifying his dismissal without notice?*

3. At the beginning of the hearing the Tribunal clarified with the parties that:

3.1 the claim included the claim for wrongful dismissal; and

3.2 Mr Bobs had identified the 2 further comparators: Mr Tyler and Mr Maher.

4. Witness statements were exchanged well in advance of the hearing. On the morning of the first day of the hearing, Mr Bobs applied to amend his witness statement to introduce a new factual issue in his unfair dismissal claim: that, in the investigation by Mr Dewar, 2 comparators he had identified had not been investigated. The Respondent objected on the basis that this was an entirely new factual allegation, that it had not known about before the hearing and, if allowed, would require the attendance of a new witness, Mr Dewar.

5. The Tribunal refused to allow this amendment for the reasons it gave at the time, by reference to the overriding objective. In summary: there was no good reason for the delay in making the complaint and Mr Bobs had had plenty of opportunities to include it in his claim; it was an new issue in the unfair dismissal claim; it would prejudice the Respondent who did not have the necessary witness.

Findings of Fact

6. After reading the witness statements confirmed under oath and hearing the oral evidence of Mr Bobs, Mr O'Connell and Mr Hinson and considering the documents referred to us in the evidence, we make the following findings of fact.

7. The Respondent company, among other matters, maintained and inspected 3 London Underground lines: the Jubilee, Piccadilly and Northern.

8. Mr Bobs was employed by the Respondent and its predecessors for more than 15 years, latterly as a Senior Track Operative.

9. For about 10 years Mr Bobs worked on the Track Patrolling Team as a patrolman. That work required him to walk a section of Tube line at night and visually inspect the tracks looking for defects. At the end of each inspection he was required to sign a declaration that the track was safe for authorised use. Any employee doing this work had to hold a T001 license.

10. It is obvious and agreed by all that one of the important responsibilities of the patrolman doing the visual track inspection was to identify and report any defect on the running rails, including cracks. This is because a crack can become a broken rail and broken rails can cause derailments, which obviously risk injury, as well as reputational damage and consequent disruption to the line. Thus, this work was and is an important way in which London Underground is kept safe for passengers and staff ('safety critical'). Mr Bobs agreed that this work was safety critical and if he did not work diligently on inspections then there could be serious consequences for safety.

11. The training and assessment required to obtain the T001 license is designed to ensure that the person holding it can correctly identify and classify defects on the track.

12. On 31 January 2017 Mr Bobs was summarily dismissed for failing to identify and report a crack on a rail. Mr O'Connell, Competence Assurance Manager, took the decision to dismiss. He was the custodian for track maintenance.

13. Before we come to the circumstances of the dismissal, we will set out the relevant history of Mr Bobs' employment.

14. In 2009 there was an incident at work because of which Mr Bobs was taken to task. It is disputed as to whether that led to him being given a formal verbal warning. We are not able to decide on the evidence we have heard whether or not any formal action was taken. The matter was not taken up in cross-examination.

15. In 2011, while he was working on the Track Patrolling team, Mr Bobs' supervisor was Mr Jason Blunt. Mr Bobs complained that Mr Quillen, also an employee, had racially abused him by saying 'come back black cunt'. As a result, Mr Quillen was dismissed. Mr Bobs genuinely believes that this made Mr Blunt dislike him because he and Mr Quillen were. Mr Bobs genuinely suspected that from then on Mr Blunt wanted to get him dismissed. Mr Bobs believed that Mr Blunt's dislike was increased when he, Mr Bobs, stood witness for another colleague against Mr Stapleton, Mr Blunt's manager, in a matter not connected with race.

16. On 7 May 2013 Mr Bobs was given a final written warning for failing to identify and report loose keys on the rail. Mr Waller, Jubilee line operations manager, took this decision. The disciplinary allegation was described as 'gross misconduct' because missing such defects was a safety critical matter. We find, therefore, that Mr Bobs knew that missing defects on the line was a matter that could be described as gross misconduct.

17. While Mr Bobs disputed that he missed the loose keys and contended that he had

been set up to fail, he did not appeal. He complained about the 3 months that it took to invite him to a disciplinary hearing. The warning was to last for 12 months but was backdated from the date of the offence. Mr Bobs did not appeal because this backdating meant there was only 6 months to go and his Trade Union advised him not to do so.

18. As a result of the 2013 matter, Mr Bobs' T001 license was withdrawn and he was required to reapply for it after training, mentoring and assessment including: a 5 day training course, a mentored patrol and an assessment. He failed this assessment twice. He had one more opportunity to obtain it before risking dismissal. He was provided with mentoring before this and was successful the third time.

19. Mr Bobs raised a grievance on 10 June 2013 (200). He complained of a number of matters including 'harassment' and 'victimisation'. This grievance was considered by Mr De Witte, Track Maintenance Manager who did not uphold it. He gave his reasons in writing (214). Mr Bobs does not refer to race in his grievance statement nor is race referred to as a matter he complained about in Mr de Witte's outcome letter. It might well have been in Mr Bobs' mind but we find he did not refer to race in or during the grievance. We also find it would not be possible for anyone looking at the grievance documents afterwards to understand that race discrimination was an element of the complaint.

20. Mr Bobs moved to the Corrective Maintenance Team. From time to time he was 'borrowed' by the Track Patrolling Team to do walking inspection patrols. He continued to hold the T001 licence required as all Senior Track Operatives were required to do, to give the Respondent the flexibility to use them on patrols when needed.

21. On 10 August 2016, Mr Bobs was borrowed in this way and had to inspect the Northern Line track between Moorgate and Euston. This section of the line had to be inspected every 72 hours. He completed his inspection and signed off the required declaration that the track was '*safe for authorised use'* at 03.50 (251).

22. On the same shift, a PM4 inspection of the same section of line took place. This was a 4-weekly inspection, paying particular attention points and crossings. The PM4 inspector, Mr McMenemy, found a crack on a wing rail at the crossing near Moorgate station. This was on the section of the line that Mr Bobs had just inspected and was near to the beginning of his walk.

23. Wing rails occur at crossings. They guide the train through the crossing and then become part of the running rail. Mr Bobs agreed that wing rails are at the '*top of list'* when looking for cracks or breaks. This is because a cracked wing can significantly increase the risk of derailment if left undetected. And, a derailment at a crossing has particularly serious consequences because of the risk of the train hitting the head wall (rather than the dynamic force being contained along the tunnel). A crash into a headwall would concertina the carriages and this would be a more serious accident. Mr Bobs agreed that a cracked wing rail at a crossing therefore posed a greater risk of loss of life.

24. Mr McMenemy informed Mr Blunt, the supervisor of the Track Patrol Team that night, of what he had found. Mr Blunt told Mr Bobs' manager, Mr Hudson (256). (As Mr Bobs accepted Mr Blunt was required to do.) Mr Hudson passed the information on to Mr Dewar, Assistant Zonal Maintenance Manager, who investigated the matter. This sequence of passing the information to the supervisor then the appropriate manager is entirely unsurprising.

25. Mr Bobs' T001 track inspection license and Site Person in Charge capability were removed pending this investigation. Mr O'Connell's job was to record this change on the Respondent's system (MAXIMO). When he did so, he did not know any of the details.

26. Mr Bobs continued in his role on the Corrective Maintenance Team. As part of this he held a Protection Master license. This allowed him to accompany other workers on to the track and be responsible for their safety for example making sure the current was off, a call-back time was given and they were appropriately booked out.

27. Mr Dewar interviewed: Mr Bobs, Mr McMenemy and Mr Blunt. From the record, Mr Blunt said nothing controversial in his interview and stuck to the facts of the matter. There is nothing on the record to suggest he said anything to influence Mr Dewar against Mr Bobs. Nor was it surprising that he was interviewed: he was the supervisor who was informed of the problem.

28. After the investigation, Mr Dewar recommended that a charge of gross misconduct be laid against Mr Bobs.

29. A disciplinary hearing was convened before Mr O'Connell on 18 October 2017. Mr Bobs was represented by his Trade Union. He had an opportunity to make the points he wished.

30. Despite the doubts raised by Mr Bobs at this Tribunal, we accept that the photograph of the crack (258) is very likely to have been the one taken by Mr McMenemy, the PM4 inspector on the shift in question. We also find that it is very likely to have been the photograph presented to Mr Bobs at the disciplinary hearing. We find therefore it is very likely to have been a photograph of the crack Mr Bobs missed. This is because:

    30.1 we accept the evidence of the time the photograph was taken at 259A i.e. the same shift; and

    30.2 at the disciplinary Mr Bobs did not cast any doubt that the crack in photo was the one found by Mr McMenemy, as he would have done if there was any serious doubt about it;

    30.3 we the photograph is not inconsistent with what the welder recorded in his email of 388A. He said the crack was visible. All visible cracks are a matter of concern. This is because the size of the visible part of the crack does not determine whether it might turn into a fracture. It is not the case

that disciplinary action and/or gross misconduct would only be levelled against an employee missing a large crack. As Mr O'Connell put it, 'a crack is a crack'.

31. Mr McMenemy stated in the investigation that he saw the crack immediately (265). Mr Bobs accepts that the crack on the photograph is visible and one that he should have seen with the torch he was using. (Only in re-examination did he raise dust in the tunnel. But we find it unlikely that this restricted his vision otherwise he would have mentioned it at the disciplinary hearing and did not and he told the appeal hearing that that the dust mask he was wearing did not obscure his vision.) Mr Bobs admitted at the disciplinary that he had missed the crack.

32. We find therefore that there was evidence before the disciplinary hearing upon which the Respondent could find that Mr Bobs had missed the crack in the photograph at page 258. We also find he missed this visible crack.

33. Defects are coded in order to set the minimum action required once they are found. A cracked wing rail is categorised as Code A defect that must be removed from the track within 48 hours. We accept the Respondent's managers' evidence that any crack can develop into a broken rail. It is not for us to judge nor do we have the expert evidence before us to distinguish between different cracks. We accept the Respondent's evidence that any crack is serious and a sign of that is that they are coded A and must be dealt with in 48 hours.

34. Mr O'Connell decided to dismiss Mr Bobs without notice on grounds of gross misconduct. He made this decision within a week of the disciplinary hearing. It took him a great deal longer to complete the lengthy dismissal letter dated 31 January 2017 (389-395) and send it to Mr Bobs.

35. On the basis of the dismissal letter and what Mr O'Connell told the Tribunal, we find that he took these matters into account in reaching his decision:

    35.1 It was the whole purpose of Mr Bobs' role on that night to look for defects. He was required to do this work diligently.

    35.2 Mr Bobs had sufficient time to undertake his inspection.

    35.3 The crack was visible, as supported by the evidence of the welder who repaired it and the PM4 inspector. Thus while Mr Bobs had been honest that he had missed the crack, it would have been difficult for him to deny this.

    35.4 Missing a defect of this kind was a very serious safety-critical matter. Had the PM4 inspector not found the crack that night the consequences could have been serious: fracture of a rail leading to derailment and a crash into the headwall.

    35.5 In comparison to a similar defect on a plain line track, a cracked wing rail at crossing significantly increased the safety risk because of the

derailment had a higher potential for injury or loss of life. (Mr O'Connell included this point in his letter of dismissal. It was not simply, therefore, a further aspect of seriousness he had thought about for this Tribunal.)

35.6 He went on '*for reference, it is also noted that you have been involved in a similar incident in the past, which subsequently resulted in a disciplinary whereby the outcome was a final warning, re-mentoring, training and subsequent re-assessment in order to regain your T001 Inspected Asset Safety Critical License. However* ***the above intervention*** *has clearly not worked and you have made the same mistake again.*' (Our emphasis). In other words, despite further training Mr Bobs had made another error.

35.7 Overall, he took into account the seriousness of breach, the effect on the Respondent's reputation in the event of an accident and the breach of the Respondent's trust in Mr Bobs to carry out safety checks in the future.

36. In his letter, Mr O'Connell also responded to the points raised by Mr Bobs and his TU representative. In particular, he decided there was insufficient mitigation here not to dismiss. This was because Mr Bobs had missed a defect before, been warned, and despite retraining and reassessment and done so again. As to the size of the crack, it was its visibility that mattered. All visible cracks were A Coded defects. Nor did he consider this victimisation from the last time as he was deciding this case on its merits.

37. As to whether Mr O'Connell was aware, at the time he made his decision, of the alleged protected acts.

37.1 We are surprised that the circumstances of Mr Quillen's dismissal did not reach Mr O'Connell's ears, at least on the grapevine, given how nasty the racial abuse was. But, on balance, we accept his denial under oath that he did not know Mr Bobs had made this allegation. This denial was not challenged by Mr Shoye in cross-examination: it was the Tribunal that had to ask him questions about it. The incident happened many years before and it is likely that, even if Mr O'Connell had heard about it, he was not aware of Mr Bobs' involvement.

37.2 While Mr O'Connell knew that Mr Bobs had brought a grievance, we accept his evidence that he did not know this grievance was related to race in any way. As we have found above, this is unsurprising: there is no clear documentary evidence that the grievance was related to race.

38. Mr O'Connell did not consult HR on his decision. He decided not give the sanction of dismissal with notice because it the matter was 'so serious'.

39. Mr O'Connell appeared to us unconcerned by the long period of time it took him to inform Mr Bobs of his decision to dismiss—about 3 and a half months after the disciplinary hearing. His only explanation was that he had a lot across his desk at the time.

40. Mr Hinson, Head of Signals, heard Mr Bobs' appeal. Mr Jackson, of the trade union, made clear representations on Mr Bobs' behalf. His grounds were that the sanction was too harsh; that leniency was warranted by his work record which made him an 'asset' to the company; that the evidence should be reviewed and the case was inconsistent with those of Mr Whiteing and Mr Cercelaru.

41. After the appeal hearing, Mr Hinson investigated the matters raised by Mr Bobs with HR and the relevant managers.

42. In deciding dismissal was commensurate with the offence Mr Hinson concluded that missing a crack was a very serious matter and that Mr Bobs' mitigation was insufficient to avoid dismissal.

    42.1 After investigation Mr Hinson did not accept the new evidence put forward: in particular that his torch was a problem or that his visibility was hampered by the direction of travel. He distinguished the Hammersmith case of a fractured rail because the crack at Hammersmith had not been visible beforehand. As to the size of the crack he decided that the instructions were clear and that Mr Bobs was required to pay extra attention around point mechanisms (a matter Mr Bobs has accepted here). And that it was a crack that therefore should have been picked up. He confirmed that all the risk assessments for the track were up to date.

    42.2 In relation to the submission made on leniency concerning his work record, Mr Hinson did not agree stating *'Your record shows you had a verbal warning in 2009 when you missed an item on the track. In 2013 you were sent to disciplinary and given a final written warning. The offence was so serious because you had failed to notice missing keys for a large section of the track. Again, in 2016, the missed crack was on a set of points which potentially was extremely dangerous. Whilst the previous sanctions had expired at the time of the latest issue, you have asked me to look into your work record. This record demonstrates that you have made similar errors before and despite previous warnings and mentoring you made a similar error again. In making this decision, I considered the error was serious enough for the charge of misconduct to be upheld. However when the chair came to considering the appropriate sanction he decided that the offence in itself, together with you apparent failure to learn from previous errors merited the most serious sanction which was summary dismissal. Having careful considered his decision I am inclined to agree with him.*' (407)

    42.3 As to the alleged comparators, Mr Cercelaru and Mr Whiteing, Mr Hinson stated he had considered the facts of these comparators. *'I reviewed both of these cases and both were different in nature to your case. I have concluded that they are not direct comparators in that both of the other cases were for first offences and both were dealt with in accordance to the seriousness of these offences.'*

43. In relation to Mr Whiteing, Mr Hinson states he spoke to Mr Bray, the decision-maker. He found out that it was Mr Whiteing's first offence and the missed crack

was on a plain running line not a wing. We accept his evidence that he genuinely took into account these differences in concluding the case was not the same as Mr Bobs'.

44. In relation to Mr Cercelaru, in his oral evidence, he stated that he thought it was an exception and a mistake that Mr Cercelaru had not been disciplined. He discovered from HR that this was Mr Cercelaru's first offence.

45. The only respect in which the Tribunal has not reached unanimous findings of fact relates to how Mr Hinson considered the comparator Mr Cercelaru: the majority (Employment Judge Moor and Mr Wood) have decided that, on balance, Mr Hinson investigated the case as he described and that he did not consider his mistake was of a different level of seriousness (as he wrote in the letter to Mr Bobs) because he told the Tribunal that, in his opinion, Mr Cercelaru should have faced a disciplinary allegation. We find he fudged this part of the letter because HR had asked him to do so. The minority of the Tribunal (Ms Houzer) decides that, while Mr Hinson may have looked at this case, his investigation was cursory. This is because in his letter he stated that the Cercelaru case was less serious whereas in his evidence to us Mr Hinson acknowledged Mr Cercelaru should have faced a disciplinary investigation.

46. Mr Hinson talked to Mr O'Connell and Mr De Witte about Mr Bobs' work record. We accept his evidence that he did not discuss his decision with Mr O'Connell. We accept that he was informed that the 2009 incident had led to a verbal warning.

47. We accept Mr Hinson's denial that he did not know about Mr Quillen's dismissal or Mr Bobs' allegation because Mr Hinson was in an entirely different section of the Respondent (signals) and is very likely not to have known about such an issue from so long ago.

48. Mr Hinson asked Mr de Witte about Mr Bobs' prior grievance and discovered it had not been upheld. We accept his evidence that he not know that this grievance included any kind of allegation in relation to race. He would not have known this from the outcome letter, which he saw – or indeed from the grievance documents we have seen.

49. Mr Hinson did not know Mr Blunt or Mr Stapleton at all. Again we accept this as likely, because he was a senior manager in signals and it is likely therefore he would have had nothing to do with them.

Comparators

50. On 22 April 2015, Mr Whiteing was found to have missed a crack in a plain running rail. He was found guilty of gross misconduct and given one contractual weeks' unpaid suspension, required to undertake mentoring and told that any other instances of misconduct within 12 months may result in further disciplinary action (411). We find he is likely also to have lost his T001 license and therefore would have had to have been retrained. This was Mr Whiteing's first offence. He

had only done about 15 patrol shifts. He was therefore a relatively inexperienced patrolman.

51. In May 2016 Mr Cercelaru missed a crack in a wing rail. On the face of it that was a serious matter but the only sanction he received, from Mr Paul Jones, assistant zonal maintenance manager, was that his T001 license was removed and he needed to have 5 mentored shifts before being reassessed (413). He had never previously been disciplined. The Respondent contends that it is surprising that Mr Cercelaru was not disciplined for this matter. (As set out above, the majority of the Tribunal accept that Mr Hinson thought this at the time.)

52. At the disciplinary hearing Mr Bobs' TU representative observed that other people have received final written warnings for this type of offence.

53. A few days after his T001 license was removed in August 2016, Mr Bobs went to protect a welder who was repairing a defect on the line at High Barnet. Mr Bobs accepted in cross-examination that the defect was found in the shift after Mr Tyler and Mr Maher had patrolled it: in other words, the next night. This meant that it could not be proved that the crack was there when they had patrolled because all agree cracks can appear at any time and a whole day's Tube traffic had gone over that particular rail. Neither Mr Tyler nor Mr Maher had any allegation made or proved against them. The decision-makers in this case did not know about this issue at the time.

54. In about the last 5 years of chairing disciplinary hearings, Mr O'Connell had dealt with allegations against 2 white and 2 black employees. He found all 4 guilty of the offence charged. He only dismissed Mr Bobs.

55. Mr Aloa was a Skilled Track Operative who was black and who was demoted at a time when it was possible to do so. We do not make any finding about his offence, which was not said to be a missed crack. At the time Mr Bobs was dismissed, demotion was not an option, because there was now no grade below Skilled Track Operative.

56. Mr Maja was an employee who was also black African. He was initially dismissed when he failed to obtain his Protection Master license on 3 occasions. The framework agreement with the Trade Union was that an employee had 3 goes to reapply. Mr Maja's appeal against dismissal was allowed because he had not been warned, prior to the 3rd occasion, that he risked dismissal if he failed to obtain his licence. Mr O'Connell was not the manager who failed to give him this warning. The Trade Union agreed that Mr Maja was an exceptional case in that he got an extra chance to obtain the license.

57. The Respondent's disciplinary procedure:

    57.1 defines gross misconduct as including a 'serious breach of safety regulations' (72);

    57.2 allows an employer to take into account an expired warning for a safety

critical matter. It provides: '*It is normally expected that these types of warning relating to incidents with a safety connotation … will be disregarded after 2 years.'* (74);

57.3 provides at paragraph 27 that '…*the employee will be advised of the outcome as soon as the Chair conducting the hearing has reached a decision*' (73).

Submissions

58. Both representatives reduced their submissions to writing, which they supplemented orally. They both assisted the Tribunal with questions.

59. Mr Shoye for Mr Bobs in summary submitted that:

59.1 the dismissal was unfair as too harsh a sanction and inconsistent with the way the Respondent had treated other employees;

59.2 the Tribunal should find that the crack in the photographs was not the crack found by the welder and missed by Mr Bobs and that should find that the crack was less serious;

59.3 Mr Bobs was known to be a person who had complained of race discrimination and this influenced the decision-makers against him;

59.4 Mr Cercelaru and Mr Whiteing, white employees, had not been dismissed for missing cracks and they were not in materially different circumstances to Mr Bobs because his prior similar offences should have been ignored as having expired. This should raise an inference of race discrimination;

59.5 it was surprising that Mr Blunt, the manager Mr Bobs alleged to have harassed him, was interviewed and this should raise an inference that he influenced the decision-makers improperly because of race or the protected acts;

59.6 Mr O'Connell had also sacked Mr Maja, a black employee.

60. Mr Margo for the Respondent in essence submitted that:

60.1 The decision to dismiss fell squarely within a range of responses of a reasonable employer to the offence found. The whole purpose of the patrol was to look for and report defects. Mr Bobs was individually responsible for that on the night in question. Cracks were particularly serious defects as they could soon turn into broken rails, which could cause derailments, which risked life and limb. And cracks at crossings were even more serious. Mr O'Connell's conclusion that Mr Bobs was grossly negligent was based on the fact that the crack was clearly visible to 2 others. Mr Bobs accepted in his evidence that if the crack was the

one on the photo it was clearly visible. That, he submitted, disposes of any broader discussion of the nature of the crack. A missed crack was a serious breach of track maintenance and therefore gross misconduct was the appropriate level of offence. In any event Mr Bobs knew missing defects was likely to result in such a charge because he had faced one before.

60.2 As to the previous warning, it could be considered as part of the overall reasonableness under section 98(4) that was Stratford para 8. Mr O'Connell only took into account training. Mr Bobs had asked Mr Hinson to look at his history/record as part of his mitigation and it was therefore an obvious thing to consider as part of that.

60.3 The Tribunal should be careful to heed the guidance in Paul that where inconsistency is raised as an aspect of unreasonableness it should only look at truly comparable cases. The offence was one matter but it was entirely reasonable for the personal factors of the other individuals to be taken into account. Thus neither Mr Cercelaru nor Mr Whiteing were actual comparators: theirs were both first offences. Neither had the retraining. Plus with Mr Whiteing he missed a crack on a running rail not a wing rail and Mr Bobs had accepted he needed to take extra care at crossings. Mr Whiteing was relatively inexperienced having done only 15 shifts. The managers here were surprised by the Cercelaru outcome. This is supported by the TU representative saying that these offences were normally at the level of a final written warning. Mr Bobs is not saying he should have been treated like Mr Cercelaru. If we found him to be a proper comparator that would be a serious chilling effect on this employer maintaining safety. Messrs Mayer and Tyler were not comparators because nothing was proven against them.

60.4 As to procedure there was nothing fundamentally wrong in Mr Hinson speaking to Mr O'Connell. Indeed it is common for the dismissing manager to attend the appeal. Mr O'Connell's delay in providing Mr Bobs with the outcome was not unreasonable as Mr Bobs was still working.

60.5 He argued that Mr Bobs' admission was critical and, whatever our decision, there should be a very significant contribution here at least 90-95%. Safety critical negligence was clearly a very serious matter.

60.6 In relation to victimisation he submitted that the decision-makers knew nothing about the 2011 incident nor did they know that the grievance was related to race and that Mr Bobs has not suggested they are lying about this.

60.7 As to the race discrimination claim: the question is what was in the minds of the decision-makers consciously or unconsciously. Mr Hinson was thorough, which indicates someone who wasn't prejudging the matter. The comparators were in materially different situations. We may disagree with Mr Hinson's distinctions but if we think that was his genuine rationale then that reduces the likelihood of an inference of race. That Mr O'Connell and

Mr Hinson did not make the decisions in relation to Messrs Whiteing and Cercelaru is relevant to whether there are 'such facts' as enable us to draw an inference.

60.8 Even if the second stage of Igen was reached, there could be no doubt but that the Respondent had given a complete explanation for the dismissal not to do with race, namely, the gross misconduct.

Law

Unfair Dismissal

61. The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996 ('ERA'). The Respondent relies upon conduct within section 98(2)(b).

62. Section 98(4) of the ERA requires the Tribunal to determine whether in all the circumstances (including the size and administrative resources of the undertaking) the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. 'Equity' includes a consideration of whether or not a fair procedure has been adopted.

63. Whether the Respondent acted reasonably or unreasonably in treating any misconduct as sufficient reason for dismissal, is considered objectively by the Tribunal, by reference to the standards of a reasonable employer, not the Tribunal's subjective view. This need to apply the objective standards of a reasonable employer is often referred to as 'the range of reasonable responses test': Iceland Frozen Foods v Jones [1982] IRLR 439. Depending upon the misconduct alleged, there may be a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer.

64. A relevant factor in the overall assessment of reasonableness under s98(4) includes disparity or inconsistency, for example, where an employer has previously treated similar behaviour less seriously. In such a case fairness demands that the employer should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified: Paul v East Surry District Health Authority [1995] IRLR 305, para 35. This is echoed by the ACAS Code on Discipline and Grievance ('the Code'), which states at paragraph 4 that employers should act consistently.

65. Where an employee seeks to argue that his dismissal is unfair because other employees who had committed similar offences were treated more leniently, the Tribunal must bear in mind how that argument advances the employee's case. In Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, the EAT identified 3 circumstances:

65.1 Firstly, it may be relevant if there is evidence that employees have been

led by an employer to believe that certain categories of conduct will be either overlooked, or at least will not be dealt with by the sanction of dismissal.

65.2 Secondly, there may be cases where evidence made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for dismissal.

65.3 Thirdly, evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal.

66. The leading case on inconsistency is the Court of Appeal in Paul. In that case a nurse, found to be drunk at work, had been dismissed when others had not been. His supervisor found to be drinking with him on the same shift was given a reprimand. Another nurse was not dismissed until a 3rd offence: she had admitted personal problems and agreed to counselling on the previous occasions. The internal appeal had considered those cases and taken the view that the circumstances were not truly comparable. The Tribunal found that the dismissal was inconsistent with those cases and unfair. The EAT allowed an appeal which was upheld at the Court of Appeal. There are 3 principles to be drawn from this case:

66.1 first, when an employer has looked at the comparable cases, it is not for the Tribunal to interfere with its decision unless it is outside the range of reasonable responses (or irrational as the test was put at paragraph 30);

66.2 second, even if it is the Tribunal that is invited to consider allegedly comparable cases, it should take into account only cases that were proven;

66.3 third, if the Tribunal is invited to consider allegedly comparable cases it must consider all the relevant factors not only relating to the offence but the personal circumstances of the employee before deciding the cases are truly comparable (para 29, 33) and bear in mind the warning in Hadjioannou:

'tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated [check] 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 it] is that a tribunal may be led away from a proper consideration of the issues raised by [s98(4)]. The emphasis in that section is upon the particular circumstances of the individual employee's case. … It is of the highest importance that flexibility should be retained, and we hope that nothing that we say … will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate…'

67. This issue of how an expired warning should be treated is in dispute between the parties. The leading case is Airbus UK Ltd v Webb [2008] IRLR 309. There the employee had received a final written warning for gross misconduct that had expired some weeks before. He committed a further offence of gross misconduct along with 4 colleagues. He was the only one dismissed because the others had clean disciplinary records. At Tribunal the question arose whether the employer's reliance on the expired warning was within the range of reasonable responses. The Court of Appeal found that it was (para 46). Mummery LJ observed that the wording of section 98(4) is very wide and did not lay down a rule that the circumstances of previous misconduct should be ignored. All the circumstances could be taken into account. He distinguished a previous case on the basis that in Webb the final offence was itself a matter of gross misconduct. (The EAT in the Stratford case relied upon by Mr Margo followed Webb.)

68. We reminded ourselves that in an unfair dismissal case the Tribunal cannot look into the reasonableness or otherwise of previous disciplinary warnings unless they were manifestly inappropriate or given in bad faith. This is especially so if they were not appealed at the time.

69. In BHS Ltd v Burchell [1980] ICR 303 set out well-established guidelines as to a fair procedure:

    69.1 did the employer genuinely believe that the employee had committed the act of misconduct;

    69.2 was such a belief held on reasonable grounds; and

    69.3 at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

70. Paragraph 29 of the ACAS Code provides that employees should be informed in writing of the outcome of an appeal '*as soon as possible'*.

71. A basic and/or compensatory award may be reduced pursuant to section 122(2) and section 123(6) ERA respectively.

    71.1 Under s122(2) ERA a basic award can be reduced if the Tribunal considers any conduct before the dismissal was such that it would be just and equitable to do so.

    71.2 Under s123(6) the compensatory award can be reduced where any action by the Claimant caused or contributed to the dismissal by such proportion as we consider just and equitable.

    71.3 The Tribunal will address: (i) the relevant conduct; (ii) whether it was culpable or blameworthy; (iii) whether it caused or contributed to the dismissal (for the compensatory award) and (iv) to what extent should any award be reduced.

Wrongful Dismissal

72. An employee is contractually entitled to notice of that dismissal unless he has committed gross misconduct.

73. Gross misconduct is very serious misconduct. An act of very serious carelessness (gross negligence) can amount to gross misconduct. The question is whether it is 'so grave and weighty' as to amount to a justification, see Neary v Dean of Westminster [1999] IRLR 288 SCD paragraph 24. Relevant to this question will be the nature of the employer, the role of the employee and the degree of trust required.

74. If an employee has been dismissed without notice and brings a breach of contract claim in the Tribunal, it is for the employer to show, on a balance of probabilities, that the Claimant was guilty of gross misconduct.

Direct Race Discrimination

75. Under section 120 of the Equality Act 2010 ('EQA'), the Tribunal has the power to determine a complaint relating to employment under Part 5. The complaint here is that the Respondent unlawfully discriminated against Mr Bobs by dismissing him, contrary to section 39 EQA.

76. Mr Bobs alleges 'direct discrimination' under section 13 EQA. Thus, he must establish that, in being dismissed, he was less favourably treated than others because of his race. He is black African.

77. The 'others' are known as 'comparators'. Section 23(1) EQA sets the parameters for the comparison: there must be '*no material difference between the circumstances relating to each case*'. '*Circumstances'* here means the relevant circumstances. A circumstance may be relevant if the employer in fact attached some weight to it, whether or not the tribunal thinks a reasonable employer ought to have done so, see Lord Roger's speech in Shamoon, in particular para 136.

78. Evidence of a comparator in similar (but not the same) circumstances might help to show how a hypothetical comparator would have been treated, see Shamoon*.* The more the circumstances differ, the less weighty this evidence.

79. Section 136(2) EQA provides: *'If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*' Section 136(2) does not apply if A shows that A did not contravene the provision.

80. The guidance of the higher courts is that the Tribunal should follow a 2-stage approach to determining the issue. (See the Annex to Igen v Wong [2005] IRLR 258 CA in what is known as the 'revised Barton guidance'.) The first stage is for the Claimant to show a reasonably arguable case for discrimination (a 'prima facie' case). If so, then at the second stage the burden is on the Respondent to show a non-race related reason for the treatment complained of.

81. A Tribunal can go straight to the 'reason why' question if it is satisfied on the evidence that the Respondent has shown the reason for any unfavourable treatment. If there is more of a question mark over the reason for treatment, it is best to follow the staged test.

82. At the first stage the Claimant must prove, on the balance of probabilities, facts from which the Tribunal *could* conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant. These are referred to below as 'such facts'. If the Claimant does not prove such facts, he will fail.

    82.1 The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International plc [2007] IRLR 246 CA para 54-57.

    82.2 Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage: there still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground, here race. See B v A [2010] IRLR 400, per Underhill P at (22).

    82.3 Therefore, here, 'something more' than a difference of treatment and a difference of race is required. (This is logical given that in some cases, a difference in treatment may merely be because of a small sample size.)

    82.4 It is important, however, to bear in mind in deciding whether the Claimant has proved 'such facts' that it is unusual to find direct evidence of race discrimination. In some cases the discrimination will not be an intention or 'motivation' but merely based on assumption or because an employer unwittingly applies a different standard to employees who do not share their own race. The outcome at this stage will usually depend therefore what inferences it is proper to draw from the primary facts.

    82.5 At this stage the question is whether the primary facts 'could' lead to the conclusion of discrimination. At this stage the Tribunal assumes there is no adequate explanation.

83. The second stage, is then for the employer to prove that it did not commit the act. It is then necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race. A cogent explanation is normally required.

84. Much has been said on both sides about 'motive'. Mr Bobs' main claim is that there was a plot to get rid of him because he was black or because he had complained of race discrimination in the past. Mr Margo has asked us to look at whether race was Mr O'Connell's 'motive'. This perhaps does not best sum up the test. We must explore the mental processes, conscious or subconscious, of the

alleged discriminator, Mr O'Connell, to discover what facts operated on his or her mind. But this is far from stating Mr O'Connell had to be 'motivated' against Mr Bobs because of race. The reference to 'subconscious' here is a reminder of the observations of many judges in this field that race discrimination can be unwitting. An example would be where a manager unwittingly holds an employee of a different race up to a higher standard than he applies or would apply to a white member of staff in the same circumstances.

85. Finally, we remind ourselves that do not need to find that race is the only reason for the dismissal as long as it is an 'effective cause'.

Victimisation

86. Section 27 of the EA defines victimisation as follows:

'*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.'

87. A protected act includes: '*making an allegation (whether or not express) that A or another person has contravened this Act.'*

88. Mr Bobs contends he did two protected acts here: first, his complaint of racial abuse by Mr Quillen; and second, in his grievance.

89. Given that it is only the dismissal that is an issue in this case, it is not enough for Mr Bobs to show that others at work were motivated to get him dismissed because of his race (or a protected act). We must consider what was in the mind of the decision-maker. This is so, even if the circumstances that got Mr Bobs into trouble were somehow manipulated by another person who was motivated against him. If the decision-maker did not know about that, he does not succeed. This has been clear since the decision of the Court of Appeal in CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Application of facts and law to issues

Wrongful Dismissal

Issue 2.12: Did the Claimant's conduct amount to a repudiatory breach of contract, justifying his dismissal without notice?

90. We deal with the wrongful dismissal claim first. We must ask on the evidence we have heard whether Mr Bobs' conduct amounted to gross misconduct. Here that means 'gross negligence' – very serious carelessness. We must consider first what we think he did and second whether that was so 'grave and weighty' as to amount to gross misconduct.

91. In our judgment, Mr Bobs missed a visible crack on a wing rail on track he was required to inspect. This was a serious defect: visible cracks must be dealt with in 48 hours; and cracks can turn into fractured rails at any time. Top of the list of the defects for Mr Bobs to look for were visible cracks at crossings. He therefore missed a defect that it was his priority to find. This was a serious safety matter.

92. Had this crack not been found on the same shift, it would have been left to traffic for another 72 hours. In other words, it would have had London Underground trains rolling over it for another 3 days. There was therefore a grave danger of it turning into a broken rail and causing a derailment. This would have risked injury, reputational damage and consequent disruption to the Northern Line.

93. Mr Bobs agreed he should have seen the crack in the photo and agreed missing such a crack was serious. We have found the crack he missed, was the one in the photo. He was highly experienced, had been retrained in order to obtain his T001 licence, was familiar with this line, had a torch that would have shown the crack and, as it was at the beginning of his shift, he was not tired.

94. His Trade Union acknowledged the seriousness of the offence by confirming others had received Final Written Warnings for such offences. They also asked for leniency.

95. In our judgment, therefore, Mr Bobs was guilty of a very serious dereliction of his duty. His carelessness was clearly, in our view, a 'grave and weighty matter'.

96. We therefore find that Mr Bobs was guilty of gross negligence amounting to gross misconduct, which is a fundamental breach of contract entitling the Respondent to dismiss him without notice. His wrongful dismissal claim therefore does not succeed.

97. For the avoidance of doubt we did not consider that the size of the crack was relevant to our decision because all visible cracks are coded A i.e. are regarded with the same seriousness in the Respondent's protocol. This is because the size of the visible part of the crack does not determine whether it might turn into a fracture.

Direct Race Discrimination

Issue 2.5: The Claimant relies on a hypothetical comparator and on his white colleagues as actual comparators: Adrian Cercelaru, Charlie Whiteing and Mr Tyler and Mr Maher.

Issue 2.6: Did the Respondent treat the Claimant less favourably than it did treat or would have treated a hypothetical comparator, or actual comparators in the same or not materially different circumstances, by dismissing the Claimant?

98. At the outset of this case it was apparent that 2 white employees who had missed cracks in rails had not been dismissed but Mr Bobs had. This raised an initial concern that a different standard had been applied to Mr Bobs and, at least, the argument that this might have been because of his race. It was reasonable of him

to raise this argument and we expected to see evidence led by the Respondent about the comparators. It was only late that they produced adequate disclosure about Mr Whiteing. And Mr Hinson had to supplement his written statement about what he had discovered about Mr Cercelaru by oral evidence. Employers answering race discrimination claims should not be complacent however much they think the reason is not race-related. We also criticise Mr Hinson and HR for the mistake he made in the appeal outcome letter on the question whether Mr Cercelaru's offence was of a different level of seriousness. The majority have accepted that he investigated the comparators adequately, but we all agree his conclusion should have been clearer in the appeal letter.

99. The first question we must ask is whether there are any 'actual comparators' in the same relevant circumstances as Mr Bobs.

100. First, in our judgment, Mr Whiteing was not in the same relevant circumstances as Mr Bobs:

100.1 this was his first offence;

100.2 he was relatively inexperienced; and

100.3 the crack he missed was on a plain running line, which would have resulted in a less damaging derailment than one on a wing rail.

100.4 Mr O'Connell did not decide Mr Whiteing's case or know about it. But these were matters Mr Hinson took into account at the time. And the different level of seriousness (which we were inclined not to think irrelevant given both misses might result in derailment) was relevant to the Respondent because it was referred to in the dismissal letter.

101. Indeed, it is partly Mr Whiteing's case that leads us to conclude there is no difference of race here. This is because his case acts like a 'mirror' to that of Mr Bobs. Mr Whiteing was in a similar position to Mr Bobs when he was first charged with gross misconduct in 2013 for missing a defect but was not dismissed. That is exactly what happened to Mr Whiteing. In other words, the Respondent treated both men, white and black, in a similar way on their first proved allegation of gross misconduct.

102. As for Mr Cercelaru, it would have been better for us to hear more about him. But on what we have found, he is not an actual comparator because his was also a first offence.

103. In any event, we accept that Mr Hinson was genuine in his evidence that he regarded Mr Cercelaru as the exception in these 3 cases. This is because Mr Whiteing's case shows another white employee not being treated like this. Of the 3 employees, it is Mr Cercelaru who stands out alone as not having been disciplined for missing a defect on a first offence. We agree, it seems to us that he *is* the exceptional case. We are supported in this view because the Trade Union observed that cases like this led to Final Written Warnings i.e. they are obviously

disciplinary matters.

104. Whilst it is not necessary for our decision, nevertheless, because the majority have accepted that Mr Hinson took into account the differences between Mr Bobs and Mr Whiteing and Mr Cercelaru, even if we had not thought they were reasonable, we would have had to accept them as relevant differences, see Shamoon.

105. In our judgment, Mr Maher and Mr Tyler were not in the same relevant circumstances. This is because nothing could be proven against them because the crack, if it were a crack, was found on the shift following their patrol after a whole day's worth of Tube traffic had gone over the rail. Thus there was no clear evidence that they had missed it.

106. As for the black comparators, Mr Aloa did not assist us as his was not the same offence and he was not dismissed. Mr Maja was treated appropriately by the Respondent, who made his an exceptional case by granting his appeal against dismissal. For what it is worth, Mr Maja's case does not support the view that the Respondent treated black employees harshly.

107. Do any of these comparators help us to decide what would have happened to a hypothetical comparator—a white employee in the same circumstances as Mr Bobs? Mr Whiteing's case shows that the Respondent is prepared to allege gross misconduct for missing a crack against a white employee. The sanction then depends upon the individual circumstances of the offence and employee. Without evidence about Mr Whiteing, Mr Cercelaru on his own would have been weightier evidence in suggesting white employees were treated leniently, but he stands out as the exception because Mr Whiteing's case does not support that proposition. Putting it another way, two white employees were treated differently as between each other, thus there is no pattern to be inferred from the treatment of Mr Cercelaru.

108. In addition: Mr O'Connell did not make the decision in relation to Mr Cercelaru. And, albeit that it is of much less weight, Mr O'Connell did not sack another black employee in a disciplinary. Finally, Mr Maja's case does not support the contention that the Respondent treats black employees more harshly.

109. For all of these reasons we do not find a hypothetical white comparator would have been treated differently. We do not consider a white employee in Mr Bobs' position would have been treated more leniently and not been dismissed.

110. This means that Mr Bobs has not proved the necessary facts at Igen stage 1 and his direct race discrimination claim fails.

Issue 2.7: If so, has the Claimant shown facts from which the Tribunal could conclude that his dismissal was because of race?

111. Had we been able to construct a hypothetical comparator we might well have found 'something more' here as Madarassay requires. We were concerned by the

delay in providing us with proper disclosure about the comparators. The lack of full explanation about Mr Cercelaru may have led us to draw an inference. Furthermore, the minority member, Ms Houzer, may have considered Mr Hinson's cursory investigation into him and his incorrect explanation to Mr Bobs about it to have been the 'something more'.

112. We emphasise we set out these considerations for completeness, none of this is now necessary, given that we have found a hypothetical white employee in the same relevant circumstances is likely to have been treated the same.

Issue 2.8: If so, has the Respondent shown that race was not part of the reason that it dismissed the Claimant?

113. For completeness, and because this case was important to both parties, we have gone on to consider the second stage and looked carefully at the explanation for the dismissal. We have asked ourselves whether it was affected at all by race. (The 'reason why' question).

114. We accept that the only reason in Mr O'Connell's conscious mind was Mr Bobs' gross negligence. This was a serious matter. Mr O'Connell had ample evidence upon which he could decide that he had missed the visible crack in the photo. To Mr O'Connell a visible crack was a crack and that was all that mattered. He did not see a difference between a small or a large crack if it was visible. A wing rail crack was particularly serious, as he set out in his letter at the time. It was therefore a matter of gross misconduct and, in this case, there was insufficient mitigation not to warrant dismissal. Mr O'Connell was entitled, when considering mitigation, to consider Mr Bobs' overall record. It would have been difficult for him to disregard it and he took care to emphasise the fact that Mr Bobs had received full retraining yet had made another error. This was not a case where he needed to add the prior warning onto the misconduct to get to dismissal: this on its own was gross misconduct.

115. Further Mr O'Connell did not make the decision in relation to Mr Cercelaru. There is no evidence therefore that he, in particular, had applied a different standard to a white employee who had missed a wing rail. Nor is there any evidence from which we can draw an inference that he unconsciously required a higher standard of conduct of black employees.

116. In our judgment therefore Mr O'Connell has given a complete explanation and race did not influence his decision to dismiss at all.

117. Similarly, while we deprecate that Mr Hinson did not give clear reasons about Mr Cercelaru in his dismissal letter, we all agree that his decision to uphold the decision on appeal was not influenced at all by race. We all agree that he wanted to avoid the embarrassment of having to admit that the Respondent had got Mr Cercelaru's case wrong and for that reason he drafted the letter as he did. There is nothing in the evidence in relation to him that would suggest race was a factor. He looked into the points raised by Mr Bobs adequately and it was reasonable for him to look at his work record and take into account the 2009 incident and the Final Written Warning in order to consider whether Mr Bobs did

have the excellent record that the TU had relied on. This is unsurprising and raises no inference of race.

Race Discrimination by Victimisation

Issue 2.9 Did the Claimant do the following protected acts (2011 allegation and 2013 grievance)?

118. Plainly Mr Bobs' complaint about Mr Quillen is a protected act.

119. We have not been able to find, on balance, however that his 2013 grievance was a protected act. The documents do not show any express reference to race. And while an express reference is not required, the documentary evidence does not support that this was implied. The closest the complaint came was to allege 'victimisation and harassment' but these do not need to relate to protected characteristics.

Issue 2.10 Has the Claimant shown facts from which the Tribunal could conclude that his dismissal was an act of victimisation?

Issue 2.11 If so, has the Respondent shown that the Claimant's protected act or acts were not part of the reason for dismissal?

120. In our judgment this issue is clear-cut and therefore we go straight to the 'reason why' question set out in issue 2.11. In our judgment, on the facts that we have found, neither of the alleged protected acts had any influence on the decision to dismiss. This is for the simple reason that neither Mr O'Connell nor Mr Hinson knew about them.

121. In any event, the suggestion that the dismissal was influenced by Mr Blunt and/or Mr Stapleton is highly unlikely. Mr Bobs continued to be employed long after Mr Quillen's dismissal and for more than 3 years after his grievance and final written warning. This period of time does not suggest that, even if they were motivated against him, these two managers had much influence. Even more importantly, there was the obvious and serious reason for his dismissal: the fact that he was found to have missed a visible crack on a wing rail.

122. For all of these reasons the victimisation claim fails.

Unfair Dismissal

Issue 2.1: Has the Respondent shown the reason for dismissal and that it was a potentially fair one? The Respondent contends the Claimant was dismissed for misconduct.

Issue 2.2: If so, did the Respondent act fairly in dismissing the Claimant for that reason in that: 2.2.1 did the Respondent form a genuine belief that the Claimant was guilty of misconduct? 2.2.2 did the Respondent have reasonable grounds for that belief? 2.2.3 did

the Respondent form that belief based on a reasonable investigation, in all the circumstances?

123. First we find that the reason for dismissal was conduct in the sense of gross negligence. We find therefore issue 2.1 made out: that the Respondent had a potentially fair reason for dismissal.

124. As we have found above, Mr Bobs' failure to spot the crack was the genuine reason for dismissal.

125. We find that this decision was reached on reasonable grounds after a reasonable investigation. Mr Shoye did not complain about these matters but we set out our reasoning in any event.

126. There were sufficient grounds upon which to conclude that Mr Bobs had missed the crack: the evidence of the photograph, Mr McMenemy, and the welder showed that there was a visible crack on the part of the track that Mr Bobs had inspected that night. And there was his admission that he had missed it.

127. There were sufficient grounds upon which to conclude the matter was serious: a visible crack is a serious defect, as evidenced by its coding (A). All agree it can lead to fracture and derailment risking injury and loss of life.

128. The investigation by Mr Dewar into the circumstances of the alleged offence was reasonable: he interviewed appropriate people and obtained the necessary evidence. Mr Shoye's only complaint was why Mr Blunt was interviewed. But, as the manager who had informed Mr Bobs' manager, it is unsurprising that he was interviewed. Nor in that interview did he do anything to influence Mr Dewar against Mr Bobs.

Issue 2.2 Was the dismissal within the band of reasonable responses available to the Respondent?

129. The real issue in the unfair dismissal claim was whether the decision fell outside the range of responses open to a reasonable employer. We have considered this matter carefully and have reached the view that it was. While both the non-legal members themselves are likely to have dismissed with notice to acknowledge Mr Bobs' long service, the Tribunal unanimously concludes that it was reasonable for the Respondent to dismiss summarily. We have done so for the following reasons:

    129.1 Mr Bobs' job was to find defects, especially cracks. His work required a high degree of diligence.

    129.2 The work was safety critical. A failure of this kind was very serious because missing a crack could lead to it becoming a fractured rail, which could result in derailment risking injury and loss of life.

    129.3 There were no mitigating circumstances on the particular night. His torch

worked. He was not tired.

129.4 He had had retraining.

129.5 He knew that missing defects was potentially gross misconduct, by his earlier experience in 2013. We are aware of at least one other employee, Mr Whiteing, who was accused of gross misconduct for missing a crack.

129.6 His work record did not provide good mitigation because he had missed a defect before.

130. We find that it was not unreasonable to take into account the expired prior warning. In fact Mr O'Connell's emphasis was on the training that followed it, which was a relevant factor in deciding how culpable was the lack of diligence. Mr Hinson took the warning into account. He did so not to determine the level of offence: that was always on its own gross misconduct. Therefore the guidance in Webb applies, that the words of section 98(4) are wide enough for it to be reasonable to consider an employee's overall record in deciding whether or not to dismiss. Furthermore here, it would have been very difficult for Mr Hinson not to do so, given that the trade union had expressly relied on Mr Bobs' record. (Finally, although not relevant to our decision, we note that the Respondent's procedure, in any event, allows them more leeway to consider expired warnings in safety critical matters and, in an exceptional case, even after 2 years.)

131. Further, for the reasons we have given above, we do not consider that this case falls into any of the Hadjiannou categories. None of the comparators Mr Bobs has relied upon were truly comparators. Nor is this a case that the comparators led him to believe that the conduct would warrant a lower penalty: indeed, from his experience in 2013, he would have known it was regarded as gross misconduct. Nor do those comparators suggest that misconduct was not the real reason for dismissal. Therefore, this is not a case where the decision to dismiss is unreasonable on grounds of disparity or inconsistency.

Did the Respondent follow a fair procedure when dismissing the Claimant? Did it follow the ACAS Code?

132. We have unanimously identified two potential problems with the procedure here: the long delay (at least 3 months) in informing Mr Bobs about his dismissal after the disciplinary hearing and that Mr Hinson talked to Mr O'Connell outside the appeal hearing, which might suggest a lack of independence.

133. The minority member, Ms Houzer, has identified one further problem with the procedure and that is Mr Hinson's cursory investigation of Mr Cercelaru when raised on appeal. She decided, however, that overall, the Respondent's investigation was not so unreasonable as to warrant a finding of unfairness because, even on what MR Hinson had discovered, Mr Cercelaru was not a comparable case.

134. We all agree that it is not good practice to speak to the decision maker outside of

the appeal meeting. But we have accepted that Mr Hinson did so here to further investigate matters and that the decision itself was not discussed. For those reasons, we have decided in this case that it was not unfair. Mr Hinson should be aware that in future it would be better to have these discussions at the hearing, in order to avoid the appearance of a lack of independence.

135. In respect of the delay in informing Mr Bobs of the dismissal, the Respondent is in breach of its own disciplinary procedure (para 27 p73) that the employee is informed '*as soon as the Chair conducting the hearing has reached a decision*'. Plainly that did not happen here. Mr O'Connell had made the decision within a week yet took more than 3 more months to inform.

136. The delay was clearly in breach of paragraph 29 of the ACAS Code in that Mr Bobs was not informed as soon as possible.

137. In our judgment this was an unreasonable delay: managers are usually busy. What was on Mr O'Connell's desk included this important matter and he had no excuse for such a long delay.

138. Dismissal decisions are important both to the individual who is hearing about his future and the employer. In this case Mr Bobs was waiting to find out if he still had the job he had held for 16 years. Lack of delay is also important for the Respondent. Here, albeit in a different role, Mr Bobs was still working in a role with safety responsibilities. The fact that he was still working does not justify, in our view, the wait. That he was waiting to hear about his future, was important enough for him to be told as soon as possible, which is why this matter is dealt with expressly in the disciplinary procedure and the Code.

139. It was submitted that delay alone was not enough to render the procedure unfair. We do not agree. We have looked at the procedure overall, and in other respects it was reasonable, but the delay in informing Mr Bobs of the outcome was a significant and unreasonable one. It was clearly in breach of the Respondent's own disciplinary procedure and the clear guidelines of the ACAS Code. That procedure and code were specific about that matter for good reason and it would therefore be unreasonable for us to ignore it now. We therefore find the dismissal to have been procedurally unfair and therefore unreasonable under section 98(4) ERA on this basis.

Contribution and Polkey

140. There is no doubt, however, that it was Mr Bobs' conduct that caused this dismissal. We have found him to be guilty of gross misconduct and that dismissal fell within the band of reasonable responses. So serious was this conduct, that in our judgment it is just and equitable to reduce the basic award by 100%.

141. Further, and for the same reasons, Mr Bobs' conduct wholly contributed to his dismissal by 100% and it is therefore just and equitable for us to reduce any compensatory award by 100%.

142. It follows also that even if Mr Bobs had been told earlier of his dismissal, that would have made no difference to the outcome and therefore it would not be appropriate to make any award of compensation for that reason.

Employment Judge Moor

8 May 2018