EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR G HOWES	V	NETWORK RAIL INFRASTRUCTURE LIMITED

HELD AT: LONDON SOUTH **ON: 9-10 MARCH 2020**

EMPLOYMENT JUDGE: M EMERY

REPRESENTATION:
FOR THE CLAIMANT **Ms C Lorraine (Counsel)**
FOR THE RESPONDENT **Mr J Praier (Counsel)**

JUDGMENT

The claim of unfair dismissal is well founded and succeeds.

REASONS

The Issues

1. The claimant was dismissed for gross misconduct. The respondent contends that the claimant had breached its harassment policy, engaging in bullying conduct against another employee, H, by swearing at and belittling him and telling him his job was at risk. The respondent argues that the claimant was an instigator of this conduct which also involved others in the claimant and H's work

team (or gang), and there were no mitigating factors which could explain his conduct. While the respondent accepts that the process was complex and lengthy, it was reasonable in the circumstances, (apart from the length of the claimant's suspension for which it apologised after the claimant's dismissal); in particular new evidence arose after H had brought an ET claim, including evidence from a whistleblowing report which needed to be considered in a new investigation.

2. The claimant accepts the respondent believed he had committed misconduct, but he argues that this belief was unreasonably held, in particular that the disciplinary process did not take into account relevant evidence, and that the outcome were unfair. H's allegations referenced incidents which were alleged to have occurred in 2015/16, H had submitted a grievance in 2016 and an internal grievance investigation and grievance appeal had found no evidence of misconduct by the claimant. It did conclude that there was evidence the claimant had shouted at H over serious safety-related breaches. H issued an ET claim which was settled, one of the conditions was that the respondent conduct an external investigation by a barrister. The claimant argues that this external investigation was flawed and did not properly consider the evidence. He argues that the disciplinary process which led to his dismissal was unreasonable, amounted to 'double-jeopardy' and there was no reasonable reason to re-open the concluded grievance issues as a disciplinary matter. He argues that the evidence he put forward relating to his interactions with H, and H's conduct and capability, was not properly assessed.

3. Unfair Dismissal

    a. The parties accept the respondent dismissed the claimant for gross misconduct, namely harassing and belittling H.

    b. Did the respondent:

        i. Act reasonably in commencing a disciplinary process against the claimant?

        ii. have reasonable grounds for believing that the claimant had breached its harassment policy by harassing and belittling H?

        iii. carry out as much investigation as was reasonable in all the circumstances of the case?

    c. Was dismissal within the range of reasonable responses available to a similar type and resourced reasonable employer in the circumstances?

    d. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point? (The *Polkey* issue).

e. If the dismissal was unfair, did the claimant contribute to his dismissal by way of his conduct, and if so would it be just and equitable to reduce compensation by any extent? (The compensatory fault issue).

The legislation and relevant legal principles

4. Employment Rights Act 1996

Part X Unfair Dismissal

Chapter I

Right not to be Unfairly Dismissed

s.94 The right
(1) An employee has the right not to be unfairly dismissed by his employer.

Fairness

s98 General

(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—

(b) relates to the conduct of the employee,

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

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

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

5. The following paragraphs contain summaries of the relevant legal principles, as set out in *Harvey on Employment Law.*

6. S.98(4) requires the tribunal to be satisfied that the respondent has acted reasonably in all the circumstances in treating this reason for dismissal as sufficient. There is a neutral burden of proof, and the tribunal must make up its mind whether s 98(4) is satisfied in the light of all the information before it.

7. It is not for the tribunal to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently

8. *Iceland Frozen Foods v Jones [1982] IRLR 439* test:

   (1) the starting point should always be the words of s 98(4) themselves;

   (2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair;

   (3) in judging the reasonableness of the employer's conduct the tribunal must not substitute its decision of what is the right course to adopt for that of the employer;

   (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

   (5) the function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

9. This means, in principle, that an employer need only adopt such procedural safeguards as a reasonable employer would adopt.

10. *Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235*, the relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did. The tribunal is not entitled to interfere simply on the grounds that it prefers one witness to another; it must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

11. Cross examination by experienced advocates in the tribunal may produce a picture of the evidence which is quite different to the picture which emerged

before the employer, yet it is the reasonableness of the latter's conduct, in the light of the circumstances prevailing at the time of dismissal, which must be assessed.

12. In *Morgan v Electrolux Ltd [1991] IRLR 89* the court of appeal considered that "serious allegations", at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by lay persons and not lawyers. The test is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where the allegations of misconduct, and the consequences to the employee if they are proven, are particularly serious: see *Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721*

13. In considering whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in *British Leyland (UK) Ltd v Swift [1981] IRLR 91*

14. On the question on the disciplinary process, the question to considering is:

— *had the employer reasonable grounds on which to sustain his belief;*

— *had he carried out as much investigation as was reasonable*; and

— was dismissal a fair sanction to impose?

15. The investigative process is important for three reasons in particular:

a. it enables the employer to discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;

b. if properly conducted, it secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and

c. even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction.

16. The ACAS Code emphasises the importance of an investigation to establish the facts**.** Paras 5 to 7 of the ACAS Code of Practice highlight the following elements of disciplinary procedures which are relevant to investigations carried out by employers:

> "5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case…

17. The EAT commented in *ILEA v Gravett [1988] IRLR 497*, the extent of the investigation depends upon the extent of the evidence available to the employers.

> "… at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required, is likely to increase'.

18. Delay in carrying out the investigation may itself render an otherwise fair dismissal unfair, there being no formal requirement for the employee to prove actual prejudice caused by that delay (though of course evidence of actual prejudice could strengthen the employee's case) (*RSPCA v Cruden [1986] IRLR 83*; *A v B [2003] IRLR 405, EAT*).

Witnesses

19. I heard evidence from Ms Helen Warnock, who chaired the disciplinary hearing, Mr Tom McNamee who heard the claimant's appeal against dismissal, and from the claimant. Prior to hearing the evidence, I read all witness statements and the documents referred to in the statements.

20. I do not recite all of the evidence I heard, instead I confine the findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

21. This judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The evidence

22. The claimant argues that the thorough 2016 grievance and grievance appeal process meant that the disciplinary investigation should never have commenced in 2018. It was unreasonable and unfair – it should never have occurred.

23. There was some confusion within the respondent's witnesses as to how the barrister's external investigation should be taken into account. In his disciplinary investigation report in June 2018, Mr. Wilson says that he was 'upholding' all allegations of race and religious related harassment against the claimant, numbering 28 allegations, based on the findings of the external investigation report and associated evidence, including text messages.

24. Mrs. Warnock for the respondent was clear in her evidence at Tribunal that it was her role to assess the evidence in the current disciplinary investigation, and that as much as possible she tried to disregard the findings and conclusions of the external investigation. In her evidence she stated that she read the 5 bundles of evidence and witness statements in H's ET claim and the external

investigation report. In her evidence she accepted that she "took account" of the external investigation report's findings in concluding the claimant had committed acts of misconduct.

25. The evidence set out below is the information (including fact, evidence and allegation) relevant to the issues in the claimant's disciplinary process which became known to the respondent during the period January 2016, when H first raised his grievance, to the culmination of the claimant's dismissal appeal process in December 2018. This period encompasses the following processes, the results of which can be summarised briefly as follows:

    a. Early 2016 to 31 January 2017: H's grievance and grievance appeal. H's allegations not upheld – no action taken. The 'grievance appeal report' references evidence of safety and capability-related issues with H.
    b. To mid-July 2017: H's employment tribunal process including 5 bundles of evidence, several respondent witness statements and one bundle of text messages; leading to H's ET settlement.
    c. To 23 March 2018: External investigation into H's allegations undertaken as a term of settlement by Ms. H Iyengar, Barrister. Report finds all race and religious discrimination and harassment allegations made by H against the claimant proven as well as findings against other Gang members and Mr. Bailey. A finding of fact was that H was competent in role and only that one of the safety-related issues raised by the claimant and others took place
    d. 23 March 2018: claimant suspended and dismissal investigation process commences.
    e. 18 May 2018: investigation interview with claimant.
    f. 8 June 2016 – disciplinary investigation report. All findings of the external investigation report "upheld" against the claimant and specified as 28 allegations of discrimination and harassment.
    g. Dismissal decision – all allegations of race and religious harassment not proven; 4 allegations of bullying proven, gross misconduct dismissal.
    h. Appeal process – appeal dismissed.

26. The documents relevant to the claimant's dismissal were a small proportion of the documents in H's documents, as they amounted to one Tribunal bundle in this case.

Findings of fact

27. At the date of his dismissal, the claimant had been employed by the respondent for over 10 years as a Technician on the P-Way Line. He worked mainly out of Hither Green Depot. His role involved working in a team, or Gang, in his case the Gang was led by a team leader, Charlie, who had many years' more experience in the role. The Gang usually worked nights. When Charlie was away the claimant often acted up as team leader. The claimant was a technically competent and experienced Technician who had many 'tickets' and who was eager to work overtime and to progress. He did not have any

leadership, management, equal opportunities or HR training at any time prior to the issues in question. He was seen within the Gang as one the dominant members.

28. As the respondent's witnesses accepted, gangs were often self-contained with their own culture, often containing team-members who had been working together for long-periods. In the claimant's case, he had been working with members of the same Gang for over 5 years.

29. It was accepted by the respondent that the culture within gangs can involve a rough and ready use of coarse language, that this was the case in the Gang. Mrs. Warnock's evidence was *"swearing was used".* She accepted during her evidence that H had, on occasion, initiated swearing in texts between him and the claimant, for example use of the 'c' word in texts at 385(a)9.

30. At the date of his dismissal the claimant had a clean disciplinary record.

31. H joined the Gang as an Operative in late 2014 and he left the Gang in January 2016. It was at this time that he initiated a formal grievance against the claimant and others. He remained employed by the respondent in a daytime gang until his employment terminated on settlement of his employment tribunal claim. H is British-born of Bangladeshi ancestry and he is of Muslim faith.

32. The role of P-Way Technicians, Operatives and others in the Gang is to undertake trackside repairs for the respondent, often undertaking complex and difficult jobs in dangerous conditions amongst live rails and rolling stock moving at speed. Safety is, clearly, of paramount concern for all.

33. The respondent has a policy of requiring any safety incidents to be reported at the end of each shift via log books given at the end of the shift to the Section Managers at the depot. The aim was that the log-book would show issues arising, also ranking the team-member's performance, 5 being the top mark. It is not clear if this was a formal written policy at the time, no policy was produced during the hearing, however the claimant accepted throughout the disciplinary process that this was the proper process.

34. For the Gang, their Section Manager at the Hither Green Depot was Mr. Keith Bailey. All Gang members and Mr. Bailey accepted in their 2016 grievance interviews and in the 2017 Employment Tribunal witness statements that the invariable process in practice was as follows: all gang members would be marked as '5', no matter what had happened on the track. The aim was that the gang would 'coach' the mistakes without involving a management process.

35. This informal process appears to have been accepted by Mr. Bailey without comment; his evidence at the grievance investigation stage was that when he found out about some of the safety issues involving H, he told the Gang to *"keep an eye"* on H. This was corroborated, says H, by comments by Mr. Bailey to H in a meeting on 20 January 2016 at which he was accompanied by his union rep (see paragraph 41 below). Mr. Bailey did not, at this time, insist that the Gang should correctly use the log book. Throughout all the processes that

followed, the claimant and other Gang members accepted that they marked H as 5, even after safety related and other incidents had occurred. They all said that this was so H could learn on the job, instead of facing the sack.

36. The way that new gang-members progressed was, after initial training, in the main learning on the job from more experienced Operatives and Technicians. As Technicians progressed they could work towards tickets showing expertise at specific functions. Inexperienced Technicians, those learning on the job, were required to wear blue safety-hats to ensure staff around knew they were inexperienced. On average, blue hats would progress to white hats – showing they were competent on the job - after around 6 months on the job.

37. By mid-January 2016, i.e. over 12 months after he joined the Gang, H was still a blue hat. The reason why this was the case was a matter of dispute and it remained a significant issue at the claimant's disciplinary hearing over 2 and a half years later.

38. In mid-January 2016 a significant event occurred. The claimant and several other Gang members who were present gave evidence in H's grievance process and in their witness statements in H's ET proceedings. They said that on the night of 15 January 2016, H committed a significant safety breach; having been told to take great care in walking close and over a live rail whilst holding a metal bar, he did not look where he was going and he tripped. The respondent's witnesses appear to have accepted that this incident occurred.

39. The claimant's evidence on this point at his grievance interview was as follows:

> *"Crossing two open lines. The electrics were still on the first two lines and they were working on the third line. This happened in January 2016. I advised him to take a big step over them. He fell between two conductor rails whilst holding a bar on his shoulder. … I lost it then …. I stated that 'I can't have this anymore' and was going to speak to [Keith Bailey]. [H] then raised a grievance."*

40. There was another witness to this incident – PH. PH's interview says that

> *"…we all had a go at him as he needs to know the dangers around him and to take more care and to think before he rushes in … [H] took it personally. It was done for his own safety. As a result we sometimes asked him to move away and ask others to take over."* (pages 96-7)*"*

41. On 17 January 2016 H complained to his union rep, Joseph Power, *"I explained it's all about the bullying and racial discrimination"* and, he says, at this meeting he referenced Mr. Power being a witness to a racist incident and says that they discussed this incident. On 20 January accompanied by his rep H complained to Mr. Bailey, alleging bullying and racist treatment. In his 'List of Incidents' H says that at this meeting Mr. Bailey said the claimant -

> *"… had been informing him over a long period of time of my performance and attitude. Keith told me I do think everything that has*

happened is because [the claimant] had to keep me under supervision at all times, that I wasn't following instructions, I could not keep up with the work which resulted in [the claimant] being stressed out and furthermore because of the nature of the work..."

42. H also alleged in his grievance that Messrs. Bailey and Power attempted to laugh away his allegations of racist harassment as *"banter"* within the Gang.

43. H subsequently submitted a detailed written grievance alleging he was the victim of racial and religious discrimination by the claimant and one other, and bullying by the claimant and two others. The grievance interviews summarises H's allegations as follows: *"bullying based on his appearance, ethnicity, fault finding or unwarranted blaming, temper tantrums, mood swings, threatening behaviour, obscene language, ganging up against a co-worker, lifestyle choices, insults, intimidation, racist remarks, verbal abuse, lying, spreading rumours, menacing or contemptuous looks, saying nasty jokes to embarrass or humiliate, encouraging others to socially exclude him, damaging his social reputation or social acceptance, threatening job loss."* (87)

44. H's 'List of Incidents' (109-118) include the following incidents which reference the claimant:

    a. 1 February 15 – *"[the claimant] was bullying me whilst we were at the depot and at Lewisham station, if he needed to speak to me he would call me by saying "oi d*ckhead, oi c*nt" as we were loading up the van he kept on insulting me telling me I was shit"*

    b. 22-28 May 15 – the claimant and others were present when a Gang member referenced a Dr. in Turkey as a 'p', that all including the claimant were laughing.

    c. 3-7 June 15 – the claimant and others were mocked H in relation to a complaint H was making to Mr. Bailey, about use of the 'p' word

    d. 16 June – 15 July 2015: on a daily basis the claimant *"not liking at all"* his fasting for Ramadan, saying *"it's stupid"* and telling him not to eat food at work; the claimant and others would *"embarrass and humiliate me and my religion"* asking repetitive and derogatory questions about Halal meat and its sale in the UK *"…they shouldn't be allowed to sell halal meat and that this is an English country…";* the claimant *"told me I was too dark and that he cannot see me as a result of my skin colour"*

    e. 15 July 2015: Charlie said 'p' in front of three others [not including the claimant] and *"we argued"* about whether it was a racist word. Back at the depot the claimant *"…was arguing [Charlie] is not racist and it's not wrong … [the claimant] told me he had informed Keith Bailey…"*

45. On 15 July 2015 H sent the following text to the claimant, relating to the incident at (e):

> *"I though you told Charlie about not to use say "Paki" and told him I was not happy about it, clearly hasn't leant anything, he just said it again 3-4 times!"*

46. In his evidence at grievance and to the external investigator, H accepts that the claimant *"had a word with Charlie"* about the 'p' word, and that Charlie then stopped using this word.

47. H made a complaint to his union rep, Joseph Power, on / around 16 July 2015, referencing *"… a member of staff making remarks he should not have said …."*. H says that on 24 July he was threatened by the claimant and others not to take the complaint forward *"therefore I decided not to take it forward."*

48. It is noteworthy that the text evidence, relied on by the respondent in its disciplinary process, suggests that up to 15 July 2015, the claimant was being asked by H to stop racist language by others, and that the claimant's approach worked. This suggests a discrepancy from H's allegations, which say that the claimant was repeatedly bullying him using racist language and repeatedly mocking his religion and religious practices in this period. At no time in the external investigation and disciplinary processes that followed does it appears that this discrepancy was picked up and questions asked of H about this discrepancy.

49. There are also a series of texts on the use of the 'p' word between H and Geoff Harris a friend and another Gang member in the period May – June 2015. These texts all reference Charlie as the instigator of racist language in this period and reference H considering complaining to the union (385(a)3-5).

50. H says that on 27 July 2015 he spoke again to Mr. Power *"and informed him about the racist slurs by Charlie"* that he was being bullied by Charlie and that the claimant *"and the night gang were bullying me as well".*

51. H alleges in his grievance that from 29 September 2015 onwards the claimant and other Gang members bullied him, the claimant called a taxi driver a 'p', insulted H's beard, including saying he should shave it, and saying there is shit in it, called him Sinbad, insulted/mimicked Indian accents and his stutter, made derogatory remarks about Muslim women's clothing. Subsequent allegations from this period to January 2016 include constant (daily) ridiculing about his accent and stutter, the claimant laughed about an attack on Muslim women. Subsequent allegations included the claimant repeatedly calling H *"chinstrap"*, the claimant's hatred of Africans, that H he was *"too dark to be seen"*.

52. H alleged that on 16 October 2015: At Lewisham the claimant *"…threatened me my job he told me I would lose by job soon because Keith knows I am shit."*

53. In mid-January 2016, H alleges that the claimant was ridiculing him, that the claimant and other Gang members *"had taken the racial discrimination to a new level …. bombarding me with insults commenting on my work ethic, they were without cause fault finding me, treating me I will not be in the night gang … or worse still have a job."*

54. H also alleges that after he put in his grievance he further overheard the night gang including the claimant saying how much they hated him. He subsequently submitted a statement saying that Mr. Power had witnessed many incidents.

55. Shortly after H left the Gang, there was the following exchange of texts between the claimant and H, which were within the ET bundle and referenced at the disciplinary stage:

> *C: "Sorry [H] just seen this all you have to put is [overtime for] Saturday …. Thanks.*
> *H: Thanks Gary, I guess you're not that bad as I thought you were, I'm just joking yeah.*
> *C: Well you're every bit as bad as I thought you were ;) only joking yeah.*
> *H Basically Gary yeah I'm sorry for fucking up all those times, coming in late and missed 2 shifts, forgetting stuff I did not do it intentionally I was really stressed out with other things at home, personal stuff.*
> *I'm on days for now Keith [Bailey] said, you must be jumping up and down for joy, wanking yourself OFF*
> *BUT …*
> *I'LL BE BACK!!!*
> *C Hahaha [H] like I said it's your life just try to leave that at home when you come to work it's really not an environment that needs a stressed head around, and look all of us give you a hard time because of the safety side of this job and it can become very stressful for is but don't worry you'll learn ……*
> *If you've not signed on the dole by then hahahaha*
> *See you soon.*
> *H let me know for extra shifts on Friday nights I'm off Saturday anyways thanks Gary…"*

56. Other sets of texts were put in as evidence by the claimant and within H's ET bundle and relied on during the disciplinary process to show that H was free in his use of bad language, also that he and H had a good relationship, at a time when he was alleged to be bullying and demeaning him on grounds of race and religion:

> 27 May 2015
> H to GH
> *I said last time it's ok when it's just me, you, [the claimant and two others] we can joke around have a laugh like last time".*
>
> 10 July 2015:
> *C Come out the back door*
> *H yeah I'm doing it*
> *C cool blud*
> *H LOL*
> *H Is it ok with you if I'm there at 10.35 CUZ*

C It's fine G
*H It would've been better if you talked like that more often you posh c*nt*
*C Like a c*nt you mean, see you later!!*
C Prick!!

September 2015:
H I'm stuck in traffic not gone past the Blackwall tunnel yes
C Ok but Pete said its flowing lovely though the tunnel and you're a lying little shit!!
H I said before the tunnel dumb shit
C Read the message prick
C Take a picture…

57. In her evidence Mrs. Warnock was asked about the context of the early 2016 texts. She accepted that these texts supported the context that the claimant was putting forward for his language, that it was the context of safety issues, and she also accepted that the claimant had always said that his shouting at the claimant related to safety-critical issues. However, she considered that the reference to the dole, also that H was a "lying little shit" was indicative of the bullying culture within the team, and that these texts were evidence of the bullying of H by the claimant. She said that the claimant's texts showed he used more swear words, and he called H a liar which was, she said, bullying conduct.

58. In his evidence the claimant said that the "dole" text was not consistent with an allegation H was going to lose his job *"no – it's a joke. It's totally different – see full context of text."* He said that the reference to the claimant being a lying little shit – this was banter - *"Peter says [H] lying, he lives next to the A2, and the text says 'Peter says … shit'. This is two and fro".*

59. In reference to H's comment *"sorry for fucking up all those times"* the claimant said that this would have included *"silly little things which could have led to an incident … there was more to it than the bigger safety critical issues – in a statement there is the time that he threw shovel down and it bounced and went close to juice. This was one of the smaller incidents."* He accepted that H got a harder time because *"he was lacking more than others. He would be told more than others."*

60. There are further texts relied on by the respondent as evidence that the claimant had committed acts of misconduct, between H and another Operative Geoff Harris (and one email from the claimant to H), which say the following:

11 January 2016
GH I've dreaded coming in tonight, everyone still being a c*nt to you last night.
GH last week
H same shit different day, I'll soldier on, eh
H Gary will probably tell you some stuff I did as usual

17 January 2016

H I'm itching so had to go to the union, they're not making it easier by pissing ME off

GH I was thinking about what you asked me this morning, it puts me in a dilemma because on one hand you shouldn't have to put up with what is happening and I do consider you a good mate, on the other hand you will be gone and I will have to face the after effects and feel responsible for whatever happens to them lot, I owe no allegiance to Gary but he has a family. I wish you'd let me talk to Keith off the record because I think I could get this resolved.

20 January 2016

GH Gary's been texting me so I told him what's happening but I didn't tell him how serious it is but he's scared shitless … he thinks he's going to lose his job. I know he's done wrong but I feel terrible about this. … he really wants to sort this out in a proper way like he should have done in the first place."

20 Jan 2016

C [H] it's Gary look I think you've taken this the wrong way like I've always said to you I think you're a good kid but just maybe are not picking up the job as fast as you probably should, if this was perceived as bullying it wasn't in the slightest meant that way. I've no problem with you and still wouldn't mind you working the nights with us. No I haven't been able to pass my knowledge on to you like you've always tried to ask …." (258-9)

24 January 2016

GH I told Gary last night that I don't want to get involved. He wouldn't leave me alone the other night. You do know I'm with you, right? People who are with you won't be questioned like I will, if I come forward for a witness that's it for me as you'll be at a different depot and I'll be known as a snitch."

GH When I spoke to my wife about my concerns about Gary losing his job because of family and mortgage etc. she says he should know he's got a lot to lose and behave accordingly. I don't know what the fuck to do. (285(a)2-3).

61. In her evidence, Mrs. Warnock justified using the texts between H and GH as evidence of bullying conduct by the claimant.

62. Given the respondent's reliance on the text messages as evidence of the claimant's misconduct, I considered it of note that, on the evidence of the texts, H was quick to text Geoff Harris in May-June 2015, when Charlie was using the p word. The next relevant texts between Mr. Harris and H start on 10 January 2016, when on the claimant's account there were two significant safety incidents and the claimant had threatened to go to Keith Harris. Because the external investigation report accepted H's account without significant enquiry, it appears that at no time was any question asked about why there were no texts between

Geoff Harris and H during this period, if as alleged by H, the claimant was subjecting him to racist bullying throughout.

63. It is also clear from the texts dated 10 January 2016 that an issue had occurred which would have been of concern to the respondent. What in fact had occurred which caused these texts to be sent was never asked of H, and Keith Bailey's answers were at best non-committal when interviewed on several occasions thereafter.

64. H was interviewed at both the grievance and the grievance appeal stages. The appeal decision summary says H's allegations included racist language and that he was bullied *"based on his appearance, performance, accent/stutter and religious practice/beliefs. This would include the use of aggressive behavior/language."* (71). H submitted additional evidence during and after his grievance appeal interview. He produced texts referencing the 'p' word by Charlie and one other.

65. The five witnesses interviewed in the grievance investigation all stated that swearing was part of the culture, the *"banter";* none say that they witnessed racist language, but they used to *"have a laugh and wind each other up"* (71).

66. The Section Manager, Keith Bailey, referenced banter being used to cheer up and motivate staff, but that some may be *"delicate"*; he gave an example of banter as saying "*lazy fu*ker"*. Mr. Bailey stated that aggressive language occurred when safety critical incidents occurred, and that H *"did not follow instructions or briefings on safety critical issues. [H] didn't take it on board and it didn't sink in. Because of this he felt that [H] could not progress forward from being a blue hat … He felt that not giving him a blue hat supported him better as he progressed he may have been a safety concern".* Mr. Bailey also said that *"gangs do not grass on each other though."* Mr. Bailey said that colleagues protected H. He referenced that H had *"walked out in front of a RV/tram and this was not disclosed … [he] was informed that [H] walked into the inclusion zone and colleagues did not want to get [H] into trouble."* Mr. Bailey said he requested the team *"to keep an extra eye"* on H (88-89).

67. In his interview the claimant accepted swearing as part of banter, and said that H did the same with him, calling him *"a posh c***" and "a fat c***".* He references incidents when *"people would take the piss"* about how long H would take to eat his food, that H would share his food with the team, he referenced a derogatory remark being made about beards by a member of the team, saying that *"beards have more faeces than a toilet seat"* – that this was directed at two Gang members with large beards and not H; that the whole team including H laughed (90-94).

68. One allegation by H was that the claimant referred to *"hating his guts and he is a "c*nt".* In response the claimant denied this, and referred to personal texts between the two: he referenced texts in October 2015 in which H texted a congratulation on the birth of his baby, ending with an 'x', that the claimant responded saying *"that it had meant a lot to him"* and responded with an 'x'.

69. One of H's allegations of bullying was that the claimant *"encouraged [H] to take the piss out of Peter and he did and as a result P said 'I am going to kill you'".* The claimant's evidence at the grievance stage was that H

> "*said to Peter "shut up you f**cking c*nt and reverse the van.' [the claimant] said he laughed as P is like a gentle giant. The was a bit of too and fro but this situation ended there. There was no argument and [H] and Peter were laughing".*

70. Another witness describes the incident as follows:

> *"reversing the van was very tight and [H] shouted "hurry up you fat c**t", to which the response was the driver got out and said "you don't even drive a f**king work van" and that was the end of it."*

71. Another staff member who it appears is of BAME origin (this is surmised because he was asked a question whether he has experienced racism, no other interviewee apart from H was asked this) says *"… I have never seen anything with [the claimant's gang] bullying is bullying and there are racist comments with all ethnic groups it could be three or four black guys at one white guy or vice versa"* (82-3).

72. One witness was Geoff Harris, with whom H had exchanged texts in May-June 2015 and in January 2016. He stated that the banter was *"part of railway culture"* (71). He was asked about the May-June 2015 texts about use of the 'p' word – and the discussion about Charlie's behaviour and whether or not H should complain: these messages did not reference the claimant. He refers to his call with the claimant around 20 January 2016, *saying "I remember him crying down the phone he should apologise if he's done anything wrong. If it's a matter of life and death you can scream at someone on the track of they've done wrong"* (85-86).

73. Significant evidence was provided at grievance stage about H's safety record. In response to H 's allegation that the claimant threatened him with job loss, the claimant's response at the grievance investigation was that *"they would micromanage [H] … he was at risk of being killed".* He referred to the following as examples of *"life threatening incidents"* involving H:

    a. In February 2015 H *"held a piece of metal that was two inches from the juice"*. There were two witnesses to this incident – IM and PH. The claimant accepted that *"he let rip"*, he said it was an issue which could have let to H's instant dismissal, that he *"reacted with language and [H] could have left a bit stupid."* He said they *"would baby him"* that there was *"a little bit of a trust issue".*
    b. *Tram – urinating on the line*
    c. *Walked on an open track*
    d. *the incident in mid-January 2016*

74. Other examples were given by witnesses of other alleged dangerous practice by H. One was H putting hand-tools between the running rail and the juice (live

rail), he would then go underneath the juice with a hand tool before a juice mat was placed over the live rail.

75. As the grievance appeal report summarises, *"All 5 individuals denied saying and/or witnessing the use of racially motivated language"* towards H. *"All 4 confirmed the common use of swear words within the depot by all individuals. Either in the form of banter between colleagues or more specifically, when safety is concerned. Several of the individuals identified safety critical incidents which resulted in shouting/screaming and swearing towards H…"*

76. The grievance appeal outcome found no evidence that the claimant and others used racially discriminatory language towards the claimant. While there was evidence that some *"racist banter"* existed in the Depot, no witness had seen it used against H. Commonly used language included *"f**ker" "di*khead" and "c*nt",* that H had participated in this type of language, and that there was a suggestion from text messages he had promoted it.

77. The grievance appeal also dealt in some detail with H's allegations of bullying by the claimant and others. The allegations were: that the claimant and others *"would on a daily basis try to fault-find anything they could whilst on track"* and that he would be *"unnecessarily blamed for any mistakes"* and his work ethic would be insulted.

78. The report concluded: *"…however the individuals interviewed from the depot highlight wider issue of safety compliance by [H] … Many of the incidents stated by [H] are identified by the individuals however they either deny the alleged bullying, state that [H] was using similar language, or the language was off the back of a critical safety incident"* (75). Keith Bailey admits telling H to *"f**k off"* in January 2015, that *"Stress was high that day over what had happened"* (i.e. a significant safety incident involving H).

79. Those interviewed identified what the grievance appeal report characterised as four serious incidents of safety compliance by H for which H was at clear fault, that after the fourth incident the claimant *"lost it",* and that shortly after this incident H raised his grievance. All witnesses alleged that H had an *"inability to learn on the job and subsequent delay in progressing from his 'probationary' status".*

80. The report concluded that the language used was coarse/crude but considered the norm that *"there was a culture in the depot"* that accepts *"the use of inappropriate language";* that there *"was evidence of frustration [with H] because of ongoing health and safety issues and this has delayed [H's] progression*". The was a recommendation that the respondent investigate the accepted use of language and whether it is line with its corporate values, and that following this *"personnel within the deport should be briefed accordingly"*. The grievance was not upheld because of a lack of evidence to support the claim of racial discrimination and bullying (76).

81. Geoff Harris was interviewed again in June 2017 following an anonymous whistleblowing complaint made on 6 April 2017 by an employee at Hither Green

depot, making multiple complaints of racist and religious abuse against the claimant (135(a) 1-2) and in relation to an allegation of assault made by H against the claimant. This whistleblowing complaint and Mr. Harris' interview were used, according to the respondent, as justification for commencing the disciplinary process against the claimant. Mr. Harris was asked about the relationship between H and the claimant. He said that he had witnessed "bullying behaviours at work by the claimant and H. He said that the behaviour *"was both ways"* that the claimant *"was on at [H] a little but because [H] would make a lot of mistakes … [the claimant] was generally on his case."* He was asked for an example – whether it was banter or malicious, and he gave an example" *"One example [H] had a big bag he used to bring in and leave it on the floor – if someone would trip over it [H] would safe be careful if you hear 'tick tick tick'".* He accepted that the banter was close to the mark *"yes it was both ways".* He accepted that the claimant hand H "disliked each other" that it was "both ways". He said that the claimant *"was on at him a little bit because [H] would make a lot of mistakes … [the claimant] was generally on his case…"* (385(a)31-33).

82. Shortly after leaving the Gang, H issued ET proceedings. H's ET claim List of Issues and Schedule of Allegations allege 49 allegations of direct race discrimination, harassment and victimisation, of which 33 referenced the claimant, alone or with others. Allegations were also made against Keith Bailey, that he dismissed H's complaints as *"banter"* and *"railway culture"*, and that Mr. Bailey had held him back from promotion and denied him a white hat.

83. Witnesses for the respondent in H's ET proceedings included those from different gangs who said they witnessed H's difficulties on the job. One witness from another gang describes in his witness statement having told H how to do the job, *"…to my shock and horror he was doing it the wrong way … which basically could have killed him if it went wrong…."*. this worker took over the job from H and completed it; he also witnessed and describes other incidents (141). *"If [H] made a mistake then got told and told again … H would always help out but at times just needed constant telling … you can't afford to make too many mistakes because there is only a short window of time to get the job done and the expression "shit rolls down a hill" is the best way of describing the pressure particularly on the nightshift…"* (145). In his evidence at Tribunal the claimant put it this way: *"I may come across as abrasive, but I was scared and do not want to see someone die in front of me, I do not want to be in this situation."*

84. All witnesses relevant to this claim who provide statements denied H's allegations of discrimination. One describes a conversation within members of the Gang including H about whether the use of the 'p' word is acceptable. One witness put the following context on the allegation about faeces in a beard: he says this was *"…was basically having a laugh at this at my expense given the fact I have quite a big beard. I remember retorting there are probably more faeces on a McDonalds hamburger than my beard and everyone was laughing, including [H]…"*. This witness, who was not a member of the Gang, describes being approached by H in January 2016, saying that *"the night gang had been making indirect racial comments and that a lot of time when things went wrong he was being made out as a scapegoat…"* (151-152).

85. The claimant's union rep Joseph Power describes H requesting a meeting with him as his union rep around July 2015. H alleged that he was being sworn and shouted at by a team member (not the claimant); his union rep considered there was a likely racial element to the remarks although H would not confirm this. H asked him to have a word with this team leader. On 18 January 2016 H informed his rep that he was being bullied and suffering racial discrimination by the claimant and others. His union rep describes in his statement how H alleged that he had witnessed incidents, when he had not, and he was later concerned that H had made an attempt to blackmail him (156-163).

86. Another witness, who worked with the claimant and H once, being based usually at London Bridge, denies that the claimant, as alleged by H, started saying how he hated African people and did not want his kids seeing them or associating with them. *"this did not happen, … as you can see I am an African man – from Nigeria. Had [the claimant] said that, I would crush him straight away…"* (164-5). A day shift team leader described working with H on occasion and finding him keen *"… but it is fair to say that he would then do something that was not quite right… I would say that this happened quite regularly … right up to the last time I worked with him … at the beginning of 2016."* (166-167).

87. One witness, Shaun King, investigated an allegation of alleged assault by the claimant on H (which H alleged occurred between November 2015 and January 2016) and other acts of alleged intimidation by others. He interviewed Geoff Harris – and describes his interview (see paragraph 80). Another witness describes that the allegation of alleged assault by the claimant on H was very similar to an actual assault on H that had occurred some years previously when H and the witness worked together on London Underground – being dragged out of a van and thrown in the back (175-6).

88. H's witness statement in his proceedings is not in the bundle. The claim settled at tribunal without admission of liability by the respondent, on payment of a significant sum and H resigning his employment. A condition of the settlement agreement was that the respondent would appoint *an "independent investigator"* – a barrister – to undertake an investigation into all allegations, bar those relating to the conduct of the grievance process and the refusal to allow H to progress to white hat.

89. The investigation was carried out by Ms. H Iyengar, Counsel, 11 KWB. Her report is dated 23 March 2018. She interviewed H, the claimant, and others against whom H had made allegations, including Mr. Bailey. Ms. Iyengar had a tribunal bundle of 1570 pages, witness statements and an additional bundle containing 483 pages of texts.

90. One witness in the external investigation accepted that he had used the 'p' word, eventually saying he would not use this word again. Some witnesses, including the claimant were, according to Ms. Iyengar *"extremely reluctant to answer any questions and I could not put all the relevant allegations to him … His account was sometimes inconsistent. For example he claimed that he did not know it was a problem if Charlie used the word 'p' but he also said that he had told*

Charlie not to use it" (207). By contrast she found H to be a credible and reliable witness, clearly recollecting incidents, his evidence was consistent with the documentary evidence and *"I explored with him … whether his memory of events was reliable."*

91. The report's findings include that H *"tried to fit in and make friends by joining in with [the gang's] swearing and cursing".* It finds that Charlie called H 'p' on many occasions, that the claimant also did so on occasion as well as encouraging Charlie in his abuse. The report finds that Charlie constantly said other insulting and racially derogatory language and that the bullying H *"experienced from Charlie in the first half of 2015 was constant and non-stop".*

92. The report finds that the claimant *"…persistently bullied [H] during 2015 including aggressively swearing at him repeatedly … in the canteen, in the van and when they were working on the tracks."* It said the claimant used racially derogatory language including *"Sinbad"* at H and *"continually mocked him during Ramadan including his fasting and dietary requirements and that "his food stank",* that he should shave off his beard, mimicking him and his stutter, calling him a terrorist. The report found that the claimant spoke *"relatively more politely"* to gang members, with comments such as *"Oh Peter, can you go and get that?"* while with H it was *"You, c*nt… go get that, Hurry up! What are you doing?"* The report also references H's 15 July 2015 texts to the claimant, and the claimant telling Charlie not to use the 'p' word. In relation to the beard comments, the report finds that while there were two others with large beards present who laughed and participated in the conversation, the remarks were directed at H.

93. The report deals with the issue when C allegedly said *"Oh d*ckhead oi c*nt",* and told him he was shit. The report found that this was a pattern and no other gang member was treated this way, it was different from the *"casual and mutual interchange of bad language"* amongst the gang. The report finds that the claimant bullied H in this way was because he was a Muslim of Bangladeshi ancestry.

94. The report also finds that H's work performance was *"unfairly criticised"* and as a finding of fact records that H's work performance was *"satisfactory"*. The report refers to one incident where H urinated on the track and was shouted at; it finds that because there was no documentary evidence of unsafe working practices, that as a finding of fact there was only this one instance of *"foolish or unsafe manner"* of work by H. It says that while there were several witness statements at H's ET claim pointing out various significant and safety related errors by H, these incidents did not occur. The report says that the reason why Mr. Bailey did not promote H to white hat was because H was a Muslim man of Bangladeshi ancestry.

95. The report finds that the claimant committed 33 acts of harassment and discrimination based on the claimant's racial origin and religion; the report recommended that disciplinary proceedings be brought against the claimant and others.

96. The claimant was suspended from work on the same date as the report, 23 March 2018. On 2 and 8 May 2018 he was written to and asked to attend an investigatory interview into *"Alleged Gross Misconduct".* The allegations mirrored the findings in Ms. Iyengar's report – race and religious discrimination and harassment. The investigating manager, Mr. Jon Wilson, did not give evidence at Tribunal. His report states that the *"purpose of the investigation was to establish facts around"* the allegations as found by the external report. It says that "the principle reference document" is the external report. All documents in the ET proceedings were also made available to the parties.

97. The summary of the claimant's interview – representing *"the key points of discussion"* show that the interview lasted for 50 minutes. The claimant was accompanied by his union rep. The claimant is asked why H felt he was being discriminated against. The claimant's evidence was:

> *"because he was continually making mistakes … it would have been anyone who was a blue hat … there was a lot of swearing and shouting, but that's P-Way life. … it was always two ways. It was a friendly environment. … H was never ready to progress. This was hidden from Keith [Bailey] which it shouldn't have been. Hindsight is a beautiful thing. We didn't want him to lose his job. He was always marked as a 5. It's just what you do. I told Keith that [H] is not ready for a white hat…. He wanted to work but just didn't pick things up quickly, but everyone got on well."*

98. The claimant was asked about whether he had been briefed about network policies, and said no, if there's an issue they go to the union reps.

99. The claimant accepted he had said to H *"oi d*ckhead" and "oi c*nt"* and that he would have told him he was shit, saying that "*terminology wise, that language is used all the time. It was banter. It was said to everyone, not just [H]".*

100. The claimant denied any knowledge of the allegations of racial and religious harassment and discrimination, and in doing so he again referred to the text congratulations from H on the birth of his baby.

101. The claimant said that *"things all started one day when we were on track and H tripped by a live rail while carrying a stressing bar. I remember telling Peter I'd had enough and was going to tell the office the next morning, and that night [H] raised all this with Keith…".* He said that he was *"disgusted"* by the barrister's report, *"it shows me as a supremacist which I am not…"* (261-3).

102. Mr. Wilson's report is dated 9 June 2018 and says that after considering the external report, the supporting information and interviewing the claimant, all allegations were *"upheld".* The rationale for reaching this decision was:

> *"There is no reason to doubt the impartiality of the independent investigator and no information provided by [the claimant] in the course of his investigation meeting served to bring the findings of that report into question.*

> *"Although [the claimant] denies the allegations against him and has been consistent in that denial, the text messages cited were contemporaneous and so gave an account and an understanding of what was happening at the time the alleged incidents were occurring. These gave a more accurate reflection of the events as they were written or said in the spur of the moment. They therefore serve as a truer source of information than the subsequent witness statements taken.*
>
> *"Therefore in completing a review of the independent investigation report and the associated materials and having interviewed [the claimant] … it is felt that on the balance of probabilities the acts in question did occur.*
>
> *"Therefore I reasonably believed that [the clamant] has bullied, harassed and racially and religiously discriminated against [H]…."*

103. The report lists 28 religious and race-related acts and bullying and harassment allegations which were upheld against the claimant. (249-256)

104. The disciplinary allegations were set out in a letter dated 20 August 2018. The letter reduced the number to 18 allegations of gross misconduct, of which 17 included allegations of racial or religious abuse or harassment. The allegations were said to be in breach of the Harassment Policy and the Equality, Diversity and Inclusion Policy. The evidence included in the bundle was: a redacted version of the external report, the claimant's employment tribunal witness statement, his disciplinary investigation interview notes and text messages.

105. The disciplinary hearing commenced on 10th September 2018. First, Jack Aveson, a supervisor who occasionally worked with or alongside the Gang or saw then in the canteen, gave evidence. He was present when the "beard" allegation arose, and he has a large beard. He brought up this issue when asked for examples of things he had heard:

> *"… a few things said about a beard that springs to mind and with me obviously having a beard my name might be mentioned in one of two of them statements … But as for [H]s statements, from the bundle I was given … there was a lot of statements that [H] has claimed and this is why we all wanted our day in the employment tribunal to actually be able to stand up and tell the court… these are the facts, that's true, that's been elaborated and exaggerated and then there were some things in there that were completely fabricated, complete nonsense, and it was made up lies and that is it … If you were to believe I was there and didn't do anything I couldn't be a supervisor, it's terrible. I wouldn't even live with it outside of work, in work, the things he said I was witness to was disguising."*

106. In relation to the 'Beard" incident he went into the detail of the conversation – that it was directed at him and another employee with a large beard and not H, who had a short beard.

107. In relation to the allegation of the 'p' word, Mr. Aveson stated *"I said in one of my statements previously I have heard that word be said … its people from an older generation who might thing its acceptable …. But I clarified I had never heard it being used derogatory to anyone or any individual especially [H]."*

108. Mr. Aveson was asked about safety incidents involving H, and he said

> *"yes there is a few. … you could never fault [H] for not being keen or not doing the work, you could fault him for a lack of common sense … so you would tell him you're not allowed to go over there …you're only allowed to work on this road. You would turn around and after one second he's wondered off onto the road that he shouldn't be working on …".* When asked if it was a lack of confidence, or common sense, he said that this issue occurred on a shift without the Gang present. He said that [H] was quiet but that *"he said his fair share of stuff about the guys … he definitely wasn't unconfident…"*

109. Mr. Aveson said that H would come to see him and talk about issues that he was genuinely upset about, including being told to feel like a *"scapegoat for when things go wrong"*, that H was upset when he considered that Mr. Bailey had leaked medical information to members of the Gang.

110. He stated that Charlie and the claimant were the 'leaders' of the gang, that the claimant was *"a lot more motivated and driven to go onto higher things".* On being asked whether the claimant could move onto Team Leader, Mr. Aveson said *"Yes, I would not have questioned his behaviours at all … he was very good at his job, he knows the railways aspect of it inside out…. He did demonstrate Team Leader's qualities in the way he wants to help people, teach them and train them up to be able to do the job on their own..."*

111. Mrs. Warnock asked Mr. Aveson about other safety incidents, and he was able to confirm what events he had witnessed, as he previously given evidence on as set out above.

112. The claimant was interviewed on17 September 2017; he described a positive atmosphere amongst Gang members. Mrs. Warner summarised his witness evidence at the outset of the interview as follows: *"…we row we argue, we swear, it's water of a ducks back, lots of two-way banter, taking the mickey out of each other, people have nicknames."*

113. The claimant denied using the phrase "chinstrap" and said the following: that another employee had told him that this was H's nickname from his prior employment on the underground – this was the same evidence this witness had given in his employment tribunal statement. The claimant accepted that he had *"hated"* wearing a blue hat, that it *"makes you feel a bit inferior …. I know why you have a blue hat now, as it is for everyone else to realise that you are new*

and probably not as wary as you should be…." He said that it was *"my fault…"* that H was a blue hat for so long *"… I can't lie to you, we hid things from management, so it has just got to fall down on me or whoever commented. I still say this to this day, touch wood he is still alive. I think he is only still alive because of us."* He said that they were all guilty of giving H a five, that this was to stop him getting into trouble. Mrs. Warnock comments that *"a lot of people have said that".*

114. The claimant said that H would have been dismissed otherwise, because *"he couldn't grasp the job, if you can't grasp the job you were doing daily, you can't be in that job, in my eyes".* He accepted that all the incidents should have been reported for being close calls, but that the Gang kept it in the team *"He was baby-sitted to the best of our ability to keep him as safe as possible".*

115. The claimant was asked in some detail about safety incidents: urinating on the track in front of a tram; a significant safety issue with a disk saw holding a metal rod no more than 2 cm above live conductor rail, about which the claimant said this was *"a disregard to his own actions".*

116. Mrs. Warnock references lots of texts from the claimant to H about H coming in late *"quite a few times".* The claimant said he did not report it, because he didn't want H to get into trouble or get his pay docked. The claimant referenced texts outlining H's personal issues, and that H apologies for making mistakes *"so he admits it, he knew he was in the wrong*", he referenced texts showing that H missed a call out, that H's phone was not on when he was on call.

117. In respect of the allegations of bullying, the claimant accepted he used words like dickhead, and c*unt but not in the aggressive manner alleged by H. He denied all of the allegations of race and religious-discrimination. In relation to the "beard" comment, he said that Jack *"was sat opposite me … Jack has a foot long beard, everyone burst into laughter, even [H] … and Jack got hammered for his beard and so did Damon and not one comment in that room was directed at [H], not one comment"*

118. H was interviewed by Mrs. Warnock. His evidence was consistent with that to the external investigation. He argued that Charlie instigated and used the p word maliciously; H complained about this to the claimant who, he says, spoke to Charlie, and the use of the p word from Charlie stopped in July 2015. From this time onwards the claimant started using the p word constantly, as did others *"… it was actually worse than Charlie … I had it easy with Charlie even though he did all those things but [the claimant] took it to a new level … he was the one to take over the racist abuse…".* He briefly refers to some allegations, and then goes onto say: *"… I didn't have a problem that they were white, I worked in other places, at TfL I was a contractor and when I worked there … I never had an issue with them we were all friends, I went to their houses, went to the pub…"* (319(a)1-10). This is contrary to the evidence given by the respondent's witnesses about allegations H made about his employment at TfL. Having read the witness statements, again this discrepancy was not picked-up on.

119. The claimant was summarily dismissed having been found to have committed four out of the 18 allegations. Each act constituted gross misconduct:

120. Allegation 3: Around 1 February 2015 the claimant said to H *"oi d*ickhead, oi c*nt"* and told him he was *"s*it"*

> The letter states that this was the *"first allegation of numerous cited incidents where [H] is systematically shouted at using derogatory language in relation to work";* the letter refers to admissions by the claimant in his interview as well as texts citing the claimant as *"the main protagonist".* The letter says *"Despite witness statements saying this was done for safety reasons there are no reported safety incidents that align with these reports. I believe this behaviour to have been of a threatening and intimidating nature and is in contravention of [the respondent's] Harassment Policy"*

121. In her evidence, Mrs. Warnock accepted that it was a safety related issue when the claimant swore on this occasion, and that the reason for the swearing was because H had a *"disk saw close to conductor rail."* Her view was that the *"shouting and abuse was not commensurate with the reason, as it was not reported. This should have been reported… [The claimant] gave me reasons for shouting, but I did not accept this situation. There are procedures to follow which did not involve this language…"*.

122. During her evidence Mrs. Warnock suggested on several times that three was no evidence that many of the alleged safety incidents had occurred. She accepted that *"of course"* there would be shouting in a safety critical incident, however there was *"No evidence that any of these incidents happened"*.

123. Mrs. Warnock was asked whether it was an important mitigating factor – that it was not necessarily gross misconduct if it was a safety critical incident that caused the language – Mrs. Warnock accepted that it would not be gross misconduct if bad language was used *"in the middle of a safety incident",* but that it would be if not related to a safety event.

124. Mrs. Warnock accepted in her evidence that her role was to decide whether the words were said, also the context of the words to determine whether they amounted to bullying conduct. For her, the issue of swearing was not absolute. While she accepted that swearing was common practice, her view as set out in her evidence, was that swearing was ok depending on context, and on the relationship between those involved. That if the recipient does not find offence, swearing is not an issue *"if accepted by that person".* Her view was that while H did engage in swearing, the *"overwhelming majority came from the clamant and not vice versa".*

125. Mrs. Warnock accepted in her evidence that a legitimate criticism could be expressed in bad language and that the claimant's case was that the incidents H complained of related to safety critical incidents. She accepted that she was required to consider available evidence to corroborate whether or not there was a safety related element to the criticisms. Her view was that while some of the swearing may have related to safety issues, other incidents were not.

126. In her evidence, Mrs. Warnock repeatedly referred to Mr. Harris' texts with H and also his evidence following the whistleblowing allegations as evidencing that the claimant acted unfairly towards H, that H was shouted at; that a lot of the swearing did not occur in safety specific incidents. She referred to the claimant's text saying that H could be on the dole as an example of abusive conduct – that he took this *"on the basis that he would lose his job…".* She said that she considered that the texts about losing his job, coupled with Mr. Bailey saying that he was not ready to progress and the claimant saying that he was not good at his job, was indicative of bullying behaviour, that he was being *"given a hard time over his job"* such as being told he was *"shit"* at his job.

127. Her evidence was that some of the safety incidents occurred. She said that in part she discounted this as a reason for poor language because the underlying issue was the work-system. *"…But my thinking behind this was that [H] was being asked to do this [a dangerous activity]. Not a safe system, .. .they did not mitigate this by setting up a safe system … the Claimant said* 'on paper' it was safe. Which suggests he knew it was not safe…"

128. Mrs. Warnock accepted that there was no comprehensive safety investigation. *"I was told that comments were made for [H's] own safety…"*; Mrs. Warnock accepted that she did not investigate further to see if there was a link between safety incidents and swearing.

129. Mrs. Warnock also accepted in her evidence that it was not the claimant's job to implement the log-book and probation system, that he was *"not in charge",* that he was not a team leader and had no training in his role and had not been trained to do it differently, that this was in fact managed by Mr. Bailey. She accepted that this may have been a systemic problem. Her view was that the claimant was part of the team and therefore shared responsibility for recording the log book, and that *"this is part of the evidence of the way he was … bullied and harassed".*

130. Allegation 24: Around 16 October 2015, the claimant told H he was likely to lose his job because "Keith Bailey knew he was sh*t"

> The letter states that this allegation was upheld as *"there are numerous witness statements (including from yourself) that cite you shouting at [H] for alleged safety and other incidents … none of these were reported. … As a result [H] was subjected to constant criticism with no way of being allowed to answer or improve because these incidents were being deliberately unreported while at the same time he was marked as 5 (good) in his log book. I believe this behaviour to be of a threatening and intimidating nature and is in contravention of Network Rails Harassment Policy."* (333)

131. The claimant accepted that he had used these or similar words. His defence as set out in the investigation stage was that this related to a safety critical incident involving H. In her evidence, Ms. Warnock accepted that one incident related to a *"recorded event"*, and a *"specific incident"* where the claimant

"acknowledged shouting and swearing after a safety incident". To support her view that the swearing had occurred she referred to the use of his language in text messages with H, as well as the claimant's own admission.

132. Throughout her evidence, Mrs. Warnock referred to incidents as *"alleged"* safety incidents. She said that the evidence in statements were from individuals who were facing disciplinary proceedings and that most incidents did not get raised until after the grievance.

133. Allegation 36: Around 14 January 2016, the claimant PH and KM told [H] he was "sh*t" and that he should lose his job and that he should not be on the railway"

> This allegation was upheld as gross misconduct, on the same terms as allegation 24. This allegation was not upheld in PH and KM's respective disciplinary proceedings – it was found that "there was no evidence that they had specifically shouted at [H] on this date

134. Allegation 38: Around 17 January 2016 the claimant PH and KM "criticised H's work ethic, threatened him with job loss and mimicked his accent".

> This allegation (with the exception that the claimant had mimicked H's accent) was upheld as gross misconduct *"…there are concurrent text messages on this date that indicate [H] as being bullied and later text messages by [GH] that implicate you specifically as leading this. The repeated mature of this behaviour I believe was of a threatening and intimidating nature and is on contravention of [the respondent's] Harassment Policy."* The same allegation was not upheld against KM and PH on the same terms as 36.

135. In her evidence, Mrs. Warnock said that she took the refence to the claimant criticising H's work ethic *"to mean how he worked. Why he was constantly shouted at. … Eg told that doing things wrong. even if the claimant says it's about safety";* that poor work ethic means that H is being criticised as not good at his job. *"And does not pick things up properly, slow."* She said that there was evidence from Geoff Harris that H was being constantly criticised. She accepted that the claimant had first said that he had had enough and was going to report to Keith.

136. Regarding the texts with Geoff Harris – she said that the claimant being "scared shitless" showed "*on balance of probability that [H] was shouted at and these texts show that the claimant treated [H] badly" ; it is "concurrent in time" and also "another thing happening was [H] was not being progressed."*

137. It was put to Mrs. Bailey that an important mitigating factor in Mr. Bailey not being dismissed on his disciplinary was that a *"lack of training and support/leadership was relevant".* She accepted that this was relevant mitigation to the issue of H progressing to white hat, but not mitigation for swearing and the claimant's other conduct, because *"… although he said it was*

related to safety events, there is no evidence that these safety events occurred." She said that mitigation did not apply to the claimant on the white hat issue because *"this allegation was not around of wearing white hat. But it indicated and supported the allegation that he was criticised about his work and treated differently".*

138. Mrs. Warnock made the following comment in disciplinary meeting with the claimant: because the barrister does not work for the respondent *"our processes say that Network Rail have to do the investigation, so this came out of John Wilson's report. So he had gone through everything and upheld them."* (305).

139. In evidence she was asked about the extent to which she relied on the external report. She said initially that she read the report, that she used it to support other findings where there were differences in the evidence, that *"in all honesty yes"* it did influence the way she considered the claimant's disciplinary hearing. She said that she used *"a wide range of supporting evidence that pointed me to probability of criticism of [H] by the claimant which was not banter."*

140. Mrs. Warnock was asked why the outcome of her investigation and disciplinary was so different from the grievance process in 2016. Her evidence was that there was new evidence which arose as part of the ET claim. She accepted that the knowledge of the '5' mark and Mr. Bailey's involvement was known in 2017, that the same people are saying the same things. Mrs. Warnock's evidence was that other witnesses cited that the shouting was not safety related – she referenced Jack Aveson, Ian Mantel, John Parsons, Joe Power and that she re-interviewed H. She said that there was *"sufficient and consistent supporting evidence that said that the claimant regularly berated"* H that this was *"supported by Mr. Aveson's interview".* She however also accepted that there was no new evidence in Mr. Aveson's interview, but that the difference was *"the interviews plus the report which I did not use…"*

141. The claimant's case put to Mrs. Warnock was that there was no new evidence – that the only difference was that *"a large about of money on settlement and report and expectation that heads need to roll – this is your context ".* Mrs. Warnock did not accept this, saying she was told to reinvestigate and was given the report. She relied on the *"text messages were not available earlier. And admission that the claimant shouted at [H]."* She said that there was no mitigation as the safety issues had not been reported *"no evidence that they happened."* She said that she *"Relied on texts because these are concurrent and shows [the claimant] treating [H] badly."* When she was questioned that no texts refer to the specific allegation of bad language – *"no not specifically but texts concurrent and did mention that being shouted at by C and treated badly."*

142. Mrs. Warnock said that she did not put specific safety allegations to H in his interview and the context of the claimant for shouting - "I took advice". Mrs. Warnock accepted that it would be understandable to shout in the moment, but not that they would be personally berated. This was not banter.

143. The above four upheld allegations were found to be breach of the Harassment Policy s.3.3 Unacceptable Behaviours: *"ridiculing or demeaning someone for example picking on them or setting them up to fail"* … *"subjecting them to persistent and constant criticism".*

144. The report says there are "*numerous incidents"* where H was shouted at – not all related to safety – his log book was being marked very good *"whilst behind his back the section manager was being told he wasn't performing well enough to be moved onto a white hat."* The report refers to text messages from the claimant referring to H as a *"lying little shit"* and *"all of us gave [H] a hard time".* There was reference to witness statements of racist language in the mess room, that H was shouted at, that the gang were *"being like a c**t"* towards H. There was also reference to intimidation – again GH's texts that it would be "it" for him if he came forwards as a witness. The witness statements refer to the claimant as the "leader of this bullying". The claimant was a senior member of the team, including the responsibility for the safety of team members.

145. Mrs. Warnock did not accept that there were any mitigating factors, and the claimant was dismissed without notice.

146. The claimant appealed his dismissal: in respect of allegations 3, 24 and 36 he said there was no evidence he used the words alleged; he refers to a text he sent to H explaining *"how concerned the team are because of the safety fears"*; he referred to a specific text where H *"acknowledges his failings and apologises for 'f**king up' and 'coming in late and missing two shifts'".* He refers to the *"jovial nature"* of this text exchange *"… and the tone was set by [H] himself. He felt comfortable in sending messages containing bad language and sexual references which shows that our relationship allowed for a humorous text exchange. My comments were not threatening …. It is clear that my one text reply has been used out of context and without taking the full text exchange into consideration".* The claimant accepts again that he raised his voice because of *"ongoing safety concerns and mistakes that [H] was making…. To make it clear any shouting or alleged "unwanted conduct" took pace in relation to safety critical issues and concerns."* He says *"I admit in hindsight I should have recorded his failures."* He references others scoring H highly, that he was *"following the example that was set by my superiors".* He refers to Jack Avison's statement, *"… I was regularly made aware that they would constantly have to keep an eye of [H] and from my own observations I could see why."* He quotes Iain Mantle's evidence – *"… In terms of [H]'s log book, I am as guilty as everyone else in having always rated [H] a five meaning he had performed really well when in actual fact he performed far less well."*

147. The claimant says he is *"confused"* why this is a reason for gross misconduct when he was only following the same procedures, as *"some more superior to me"*. He references no management training on performance management – he *"followed the lead"* of his superiors. He references health and safety concerns relating to [H] raised by other staff members, Keiran Benton, Andy McConville. Regarding the dismissal letter's reliance on Geoff Harris' evidence, the claimant says at most he says I was *"generally on [H's] case"* but he disputes allegations that he had acted inappropriately towards H." *"To make it clear any*

shouting or alleged "unwanted conduct" took place in relation to safety critical issues and concerns". He references again that *H's "poor performance and health and safety concerns were not recorded correctly by anyone in the company, not just me".*

148. In relation to the alleged use of the'p' word, he says that the only references are to Charlie and one other. He refers to the fact that *"this investigation has been continuing for three years the stress that I have been going through … has been devastating." The claimant references the dismissal letter's use by the claimant of you're a "lying* little shit" – he references to the context of the email 0 which he says "needs to be considered to understand the actual tone", and he quotes the exchange. In reference to the dismissal letter's reference to him admitting that he and the gang had given H "a hard time" the claimant asks for the "context of this text exchange to be considered, and he quotes the text exchange. He says that H is acknowledges and admitting to his own failings – and that the claimant's comments were "related to my fears that not having a clear head on the job will put him and others at risk That "hard time" is, he says, "in terms of repeatedly pointing out these concerns and trying to support him … there is evidence through this text exchange that the behaviour and language went both ways …"

149. The claimant states that there was a disparity of treatment between him and colleagues "My actions were no different from there's". He said that dismissal was too harsh a sanction, and asked to be reinstated (341).

150. The claimant attended an appeal hearing on 19 November 2018 heard by Mr. Tom McNamee. He said that he only ever shouted at H in *"safety critical situations … we were just trying to keep him alive… "*. He again made it clear that the whole gang marked H 5 in his log-book, *"Looking at everyone else' statements you can see he is as safety concern. Different people are saying he's a concern…".*

151. Mr. McNamee makes it clear that the claimant was dismissed *"on the grounds that you were the ringleader, and that is what you have been dismissed on."* The decision was that the appeal was rejected. Mr. McNamee accepted the dismissal letter around safety and *"and your negligence to report those incidents I consider these to be very serious".* He accepted that 3 24 and 36 more than likely happened and 38 did happen. He says that *"I don't think all of H's allegations were accurate... However, based on all the allegations and the 4 breach of safety aspects I do feel dismissal was appropriate…".*

152. Mr. McNamee accepted in his evidence that the appeal was a *"rehearing",* meaning he would reach a fresh decision on the evidence. He accepted that he could consider unfairness with the process. He accepted that the claimant argued he was shouting and swearing in relation to safety incidents, and he accepted that there was some evidence that this was the case, and some evidence that it happened in other locations also – in particular the reference to Geoff Harris text messages. He said that threatening a job was unacceptable; in relation to the claimant's text referring to the dole, Mr. McNamee said that this was H *"… fitting in – he is a smacked child and trying to please superior. I want*

to be part of your group." He said that that the claimant "should have bene reporting allegations of safety issues]. It formed context of the whole group mentality which was being led by the claimant. meaning that H was being bullied."

153. Mr. McNamee accepted that when he was hearing the appeal there were *"…two issues. The 4 safety incidents happened exactly as described, not reported, kept within team and the claimant was acting team leader and he neglected to follow procedure. Very serious safety incident. Other aspect of case is that I felt that these were blown out of proportion, that if they were so serious they would have been reported."* Mr. McNamee said that he read Mrs. Warnock's report which referenced *"numerous incidents"* that reference to being scared to be a "snitch" – that this culture prevented the allegations from being properly investigated in 2017; that the atmosphere created by the claimant *"…as leader meant others were not as forthcoming as they could have been."*

Submissions

154. For the claimant Ms. Lorraine argues that the first issue is procedural fairness when faced with the same allegations twice. It's *"not uncontroversial"* that there should be finality and this was provided in 2016 with the grievance appeal outcome report when the claimant was told no further action to be taken in relation to these allegations. Ms. Lorraine accepted that if there was new evidence, it may be reasonable to reopen the issue. But there are no new facts, only the H settlement and the independent report. She argued that the report is the respondent *"deciding"* to reopen the issue, which is not fair – simply because of the respondent's choice at settlement. The respondent was not required to reopen, and in the absence of new evidence "it's not fair" for the respondent to reopen.

155. Ms. Lorraine argued that the context of the disciplinary outcome is important – only 4 out of 28 allegations upheld; the core allegations of discriminatory bullying were not upheld.

156. In context, the evidence shows that the claimant "has been consistent and straightforward in accounts he has given over a period of 5 years." He accepts that he uses very colourful language all of the time. He has sworn. This is not bullying.

157. The claimant has accepted shouting at H with or without swearing – he did so in response to safety critical incidents. He denies swearing and having a go without the context of this being response to safety incident. It is *"wholly unfair"* to say that because the claimant has accepted using bad language and also shouting in the context of safety issues that he has accepted bullying, or that this admission supports the allegation of bullying. They are fundamentally different. The evidence relied on does not support bullying – in fact it supports the claimant's case - swearing, banter and having a go when H acting dangerously.

158. She argued that there is *"no evidence on which reasonable employer can show acts of misconduct in way allegations framed"*. The respondent is essentially saying, "we can't show that the allegation did happen, but you have admitted other things and so we will uphold this allegation. This is demonstrably unfair." There is an equal lack of evidence for the discrimination allegations, and these were not upheld.

159. The significant concern was that H had been held back from getting a white hat. Despite this not being a disciplinary allegation, she found that the claimant had held H back *"and used this to justify dismissal. This is unfair".*

160. Ms. Lorraine pointed out that in fact H was protected by the system adopted, he got good marks even when not up to the job, rather than get him in trouble. This was positive for H, not evidence of being bullied.

161. She argued that Mrs. Warnock's evidence was inconsistent as to whether she accepted safety critical incidents occurred and whether she took them into account. Generally her evidence was that she did not believe safety incidents occurred, despite evidence that multiple people raised this issue. There was a clear reference in texts to H making mistakes. And it is not a reasonable interpretation of the texts that they are bullying in nature. On ordinary reading this is banter. Texts looked at by the respondent selectively and not fairly.

162. On the appeal, Ms. Lorraine argued that it was clear that this was not based on anything different. The exact same approach taken on appeal, including a negative view of the claimant for not reporting safety issues. She also referred to an "entire failure to consider mitigation" including the lack of training and Mr. Bailey's involvement.

163. For the respondent, Mr. Praier reminded me that the temptation to *"substitute"* my own reasoning for that of the respondent was to be resisted.

164. Mr. Praier referred to the case of Christou and Harringey on the issue of res judicata and double jeopardy. In this case, there were a number of circumstances – a "whole host" of additional evidence including (i) ET claim and a whole host of additional evidence – 30 witness statements and 1500 page bundle. Settled. And to open this up again. This is relevant circa: (ii) Whistleblowing report -135a. (iii) Speak out interview with Geoff Harris; all of this context meant it was reasonable to have an independent investigation. This independent investigation found most of the allegations were made out; it was within range of reasonable responses to reopen.

165. In the disciplinary process, Mrs. Warnock considers the evidence; again the range of reasonable responses test applies. It was reasonable for the respondent to discount safety issues, and this was not a case of banter or two way interaction. The texts of Geoff Harris are *"suggestive of wider ill-treatment"* of H – for example texts of 11 January 2016. Even if there were safety incidents *"does this justify bullying?".*

166. Mr. Praier argued that it was unfair to expect an employer to look at each of the defence issues raised by the claimant. Mrs. Warnock was *"assiduous and careful how she underwent the process."* By finding 24 out of 28 allegations in the claimant's favour she applied her own mind and carefully considered the evidence.

167. On Polkey, Mr. Praier argued that if there was fault in the process what would have happened? Dismissal inevitable.

168. On the claimant's contribution to his dismissal, others were responsible for safety, but he did mark a 5 and we have acceptance of the language the claimant used, and this was inappropriate.

169. In response, Ms. Lorraine argued that the test of whether to restart the process is *"fairness"* – the starting point for the claimant is that it was "not fair" to put him through this disciplinary. This case is a *"world away"* from the facts in Christou – the whistleblowing report did not contain any new allegations, and in fact the issues raised in the whistleblowing report were never put to the claimant. She argued that if it was unfair to restart the process there shod be no reduction on grounds of Polkey. There should be no discount for failure to report safety allegations or for the claimant's bad language.

Conclusions on the evidence and the law

170. I took note of the requirement not to substitute my views for that of the respondent, the test is what another reasonable employer of similar size and resources may do, the range of reasonable responses test.

171. I considered in particular whether the respondent

    a. had reasonable grounds on which to sustain its belief;

    b. had carried out as much investigation as was reasonable; and

    c. was dismissal a fair sanction to impose,

172. I considered the ACAS Guide, in particular the need to undertake investigations "without unreasonable delay to establish the facts…" and the case *of ILEA v Gravett* - the extent of the investigation depends upon the extent of the evidence available to the employers.

> "… at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required, is likely to increase'.

173. The first issue – was it reasonable to reopen the facts of this issue as a potential disciplinary matter? This is what the external report had recommended.

174. The respondent put forward no evidence for the appointment of the external investigator; it was it appears a matter of negotiation between H and the respondent. It is difficult to question the reasonableness of a decision made in the heat of negotiations and which then becomes a matter of contractual obligation. Bearing in mind the test is what another reasonable employer may have done. I accepted that the decision to appoint an external investigator was within the range of reasonable responses.

175. On the outcome of the independent investigator's report, in any reasonable process its findings needed careful analysis. It was not written as a disciplinary investigation report. It appears that the claimant and others were not accompanied by union reps to their external investigation interviews, and there is no evidence that they were given this option. The investigation report casts the claimant in a very unfavourable light. The report gives far less weight to statements taken as part of the grievance investigation, effectively discounting all witness evidence (203), placing greatest weight on evidence generated between October 2014 and May 2016 and on the interviews conducted as part of the external investigation.

176. It is apparent that Ms Iyengar made significant findings on issues of safety which directly contradicted the 2016 grievance outcome. She finds as a fact that H's performance was satisfactory. She finds as a fact that several incidents of safety incidents did not occur.

177. The respondent's reasoning for commencing the disciplinary investigation stage was 'new evidence' – the texts and other evidence from H's ET claim (the relevant parts of which form part of this Tribunal bundle), the anonymous whistleblowing report, and interview with Geoff Harris.

178. I accepted that the texts on first reading showed that there was a significant issue involving the claimant and H January 2016. However, all they referred to was H having a hard time, and saying Geoff *"Gary will probably tell you some stuff I did as usual"* – suggesting there is an issue of a safety or capability issue (or issues) involving H. They also refer to the claimant's concern he is going to be disciplined. The interview with Geoff Harris was not particularly illuminating – he accepts tensions between the claimant and H, that they did not like each other and it was *"both ways",* and that a lot of the issues were safety-related.

179. There was therefore, very little evidence on which to justify a fresh investigation. However, notwithstanding the lack of new evidence, I accepted that it was reasonable to commence a disciplinary investigation process. This is what the external report had recommended. A reasonable employer could clearly take the view that it should not second guess this recommendation, made by a barrister instructed to investigate.

180. But this is the stage – the investigation stage – at which I considered a reasonable employer would apply the most careful analysis to the evidence. As Mrs. Warnock said in her meeting with the claimant, the external report was not one which could validly be used in the process.

181. Instead of a careful analysis, the outcome of the external investigation was accepted in full – all allegations were classed as 'upheld'. I did not consider that this was the action of a reasonable employer of similar size and resources, particularly dealing with allegations of potentially safety-critical involving safety critical roles. The external report had specifically stated that safety issues were not a particular factor in the treatment of H, directly contradicting the grievance findings, the respondent's own case at H's tribunal and all the relevant evidence of witnesses

182. I considered that it was incumbent on a reasonable employer to carefully analyse the evidence. The respondent did not do so. Had it undertaken a careful analysis of the relevant evidence – the documents in this Tribunal bundle and set out above – this would clearly show the following issues of relevance:

    a. Banter and crude language was part and parcel of the culture of the Gang as well as other gangs – this was accepted at grievance stage and was the evidence of all witnesses who gave evidence at any stage, bar H.
    b. All witness say H's work was of poor standard – and he caused safety critical errors, often because of lack of thought.
    c. H initiated crude language and banter in the team, and on the evidence given did so in texts with the claimant.
    d. The texts clearly show H recognised he had committed safety-related mistakes and he did not deny that he brought 'problems' onto the job.
    e. A careful look at the texts would show that they did not match with the allegations made by H against the claimant (paragraphs 48 and 62 above).
    f. Apart from H's allegations of the p word in 2015, there is no other contemporaneous evidence of racist language.
    g. The evidence including that of H was that the claimant successfully stopped Charlie from using the p word and there was no evidence apart from H's interview that the claimant had subsequently used racist language.
    h. The texts to and from Geoff Harris in early 2016 clearly indicate big problems between the claimant and H, that H was unhappy at his treatment and Geoff sympathised with H. They show that the claimant was worried he would get the sack – and that Geoff believed me may deserve it. At interview Mr. Harris comments that the claimant was always on H's back and that they did not get on, that there were safety related reasons for this.
    i. Witness evidence describe the claimant 'screaming' at H after safety-related incidents, and the claimant accepted he had done so.
    j. All witnesses described a culture where incidents were kept within the team and a word with the manager – and this was accepted by Mr. Bailey when he spoke to H on 20 January 2016 and was known during the grievance process

183. The claimant was interviewed at disciplinary investigation and he again raised safety-related reasons. This was again not investigated or considered. Instead,

a note was put on the report to say safety was likely to be one of the issues in 'contention' at the disciplinary hearing (254).

184. I therefore found that a reasonable investigation was not carried out at this stage. A proper analysis of the available evidence was not carried out, and the external report was accepted and upheld in full. This was outside the range of options open to a similarly sized and resourced employer. What may have happened had a proper investigation been undertaken is dealt with below.

185. No questions were asked of H at investigation stage relating to some critical issues. At disciplinary stage, Mrs. Warnock asked no questions to H about safety issues, apparently on legal advice. As she said in her evidence, she was required to corroborate whether safety incidents had occurred but was unable to do so by asking H about these issues.

186. H was asked no questions about his text messages, no questions were asked of H about the discrepancies in his texts vs his allegations in 2015/6, or about the nature of the banter disclosed within the texts that was initiated by H, whether he felt bullied by the 'dole' comment or other messages in texts.

187. H was not asked or about any issues at TfL – for example over the issue of the alleged assault and similarities with an alleged incident with the claimant; also the alleged use of "chinstrap" at TfL – after his evidence to Mrs. Warnock that he had experienced no issues at TfL.

188. This was all material within the bundles which Mrs. Warnock had considered and which were relevant to the claimant's case. Without asking H about at least some of these issues, I did not consider that any investigation would be able to reasonably assess the credibility of H's allegations and the claimant's defence to these allegations.

189. Despite H not being asked about these incidents, the claimant's case, that the incidents of shouted abusive language related to significant safety incidents was not accepted. The reason according to Mrs. Warnock, was that the proper reporting procedure had not been followed, so there was no evidence that the language and safety were related. Jack Aveson' evidence was also discounted without explanation. Again the evidence from Mrs. Warnock was that this was discounted because they had not been reported, there was no evidence they had occurred.

190. On the evidence, I found that this was not a reasonable position to take as there was clearly evidence of sufficient safety related issues – which no-one had reported. Even Geoff Harris' evidence was that H got a hard time over safety issues. The claimant had admitted "losing it" throughout the history of processes because of safety-critical issues. This was at least a point of mitigation. There was no evidence to show that this was not safety-related, H was not questioned on this point, and there was overwhelming witness evidence which said safety was a very significant issue with H and in his relationship with the claimant and was the significant reason for the claimant shouting at H in the

heat of incidents. I did not consider that it was the position a reasonable employer would take, to discount this evidence.

191. Mrs. Warnock said that she took account of the external report, having said that she was not going to do so. This alone was not a reasonable position – it was misleading to the claimant and accordingly outside of the range of reasonable responses.

192. It was suggested in closing that it was permissible for the disciplinary process to disregard this ET evidence and the grievance evidence as it was essentially self-interested – staff trying to protect their position. That is always a possibility, but there was also evidence from H that the poor treatment did relate to safety-related incidents, and that he was told at the time by Mr. Bailey that the claimant had been raising safety-related issues with him. There was no reasonable ground to disregard the evidence of safety related issues.

193. A factor which counted against the claimant was his involvement in the '5's. Mr. Bailey, who it was found had held H back, received a final written warning on this issue, because he had not had appropriate training. Neither had the claimant, and he neither instigated it nor was in charge. It was also not a disciplinary allegation against him. While ancillary evidence and findings gained in an investigation can be used as evidence in support of allegations, it was not reasonable to equate the claimant's participation in this culture as additional evidence to support allegations of bullying. Account should have been taken for the reason why H was being held back, that Mr. Bailey was aware of these reasons.

194. In making this assessment on the evidence available to the respondent, I am conscious of the guidance in Morgan v Electrolux, that the investigation stage is not for lawyers to conduct. However, in deciding to take the case forward, it was incumbent on the respondent to carefully consider the evidence that was readily available to it. It is clear that a careful reading of the evidence meant it was unreasonable to discount the claimant's explanation for shouting at H, his explanation that abusive and crude language was the norm, his explanation that H often initiated this language. The analysis of the evidence did not meet the test – it was an unreasonable analysis at both investigation and disciplinary stages, and it was outside the range of reasonable responses of a similar employer.

195. In concluding the claimant had committed gross misconduct, the respondent did not consider the available evidence properly or appropriately, and in doing so did not act reasonably. At appeal stage this failure was not rectified. For this reason, the claim of unfair dismissal is well founded and succeeds.

Polkey

196. I next considered what would have happened under a fair process. Had the investigatory material been properly considered, it would have shown evidence of a culture of crude language, and the claimant reacting with loss of temper and bad language to H at the time of safety-critical events and of the claimant 'losing it' in mid-January 2016 over a safety incident, saying he was going to

report H. A proper consideration would have shown a culture of underreporting safety incidents. The grievance report, while aware of the culture of underreporting, had not made recommendations at this stage – its recommendations related to the use of inappropriate language.

197. Given the overwhelming evidence was that the claimant shouted at H over safety incidents, was this worthy of a disciplinary finding of gross misconduct? Mrs. Warnock herself accepted that extreme stress can lead to bad language and shouting; the language used by the claimant was in common use. I did not accept that heat of the moment language after what the evidence shows were safety-critical incidents which appear to have been caused by H's own conduct, was an issue for disciplinary, over 2.5 years after the last incident.

198. The totality of the evidence clearly showed safety related issues, which H was not asked about. I concluded that a fair investigation would lead inevitably to the view that the claimant had shouted at H over safety related issues, that he said he had "had enough" was "going to speak" to Mr. Bailey, an inference that H was in significant trouble. In doing so he used foul language which was "accepted" language within the Gang and the wider railway culture. This may not have been acceptable language for the respondent, but it was not, at this stage, an issue on which the claimant had been trained, and was language all others were using.

199. Whilst the claimant can be criticised for what he did with the log books, I did not consider that the lack of official reports of safety incidents was a good enough reason to discount his evidence.

200. I concluded that while a reasonable process may have led to a disciplinary hearing, it would not have been on the disciplinary charges he faced. Any charges, on the evidence, would not have resulted in the dismissal of the claimant. The evince showed foul and abusive language being used by all, that H had been shouted at over safety serious incidents and the claimant engaged in the culture of marking staff '5's even when safety incidents were involved. Given no member of staff was dismissed over the use of '5', I did not consider a reasonable employer would have dismissed the claimant based on this evidence.

201. Did the claimant contribute to his dismissal? He engaged in the generally accepted practice of marking '5's, and the generally accepted (within the depot) practice of using foul language. Given the findings above, I do not accept that this was in any way a contribution by the claimant towards his dismissal worthy of a finding of contributory fault. Mr. Bailey had been disciplined and not dismissed for the '5' issue, and he had also admitted swearing at H.

Remedy

202. The claimant seeks reinstatement or reengagement. Within 21 days the parties are to engage with each other and provide an agreed 'joint' email containing suitable dates for both parties for a one hour Telephone Case Management Discussion in July 2020, which will consider Directions for a Remedy Hearing,

including whether a Remedy Hearing can be held by video, if not possible in person within a reasonable time-frame.

_____

EMPLOYMENT JUDGE M EMERY

Dated: 8th June 2020